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In The

Supreme Court of the United States

October Term, 1995

FRANK PALERMO, et al.,

Petitioners,

versus

CLAUDE E. WOODS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is favorable termination of the underlying prison disciplinary action against a state prison inmate an essential element of the inmate's Section 1983 retaliatory disciplinary report claim or is it merely one factor to be considered?

PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: Frank Palermo and John Preston, who were defendants in the district court and appellants/cross appellees in the Court of Appeals.

Leon Daigrepont, Michael Roberts, Martin Regel, and Harvey Grimmer were defendants in the district court and appellants/cross appellees in the Court of Appeals. They do not petition this Court.

Larry Smith and Leslie Dupont were defendants in the district court. They did not appeal to the Court of Appeals but were cross appellees there. They do not petition this Court.

Respondent: Claude E. Woods, who was the plaintiff in the district court and the appellee/cross appellant in the Court of Appeals.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners urge that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a decision of the United States District Court for the Middle District of Louisiana. That judgment denied petitioners' assertion of the qualified immunity defense raised via a motion for summary judgment.

OPINIONS BELOW

The August 15, 1995 opinion of the United States Court of Appeals for the Fifth Circuit is reported at 60

F.3d 1161 (5th Cir. 1995) and is reprinted at Appendix A to this petition, p. App. 1. The district court's January 3, 1994 opinion adopting the April 6, 1993 and October 25, 1993 reports of the magistrate judge (and thereby denying the qualified immunity defense) is unreported and is reprinted at Appendix B to this petition, p. App. 14. The April 6, 1993 report of the magistrate judge is unreported and is reprinted at Appendix C to this petition, p. App. 16. The October 25, 1993 report of the magistrate judge is unreported and is reprinted at Appendix D to this petition, p. App. 27.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 15, 1995. This Court has jurisdiction under 28 USC Section 1254(1). The petitioners seek review of the denial by the Court of Appeals for the Fifth Circuit of their qualified immunity defense. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The issue presented is a question of law[1] concerning the identity of the essential elements of respondent's claim.

[1] *Johnson v. Jones*, ___ U.S. ___, ___, 115 S.Ct. 2151, 2158, 132 L.Ed.2d 238 (1995).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved.

United States Constitution

U.S. Constitution, First Amendment (1791):

Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the Government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment (1868):

Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;

United States Code

42 USC Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent, Claude E. Woods, is a convicted felon sentenced to the custody of the Louisiana Department of Public Safety and Corrections (Department) and was, at all relevant times, incarcerated at the Louisiana State Penitentiary at Angola, Louisiana (LSP). Respondent remains incarcerated at LSP.

On April 27, 1990 respondent filed a *pro se* complaint in the United States District Court for the Middle District of Louisiana asserting numerous claims under 42 USC Sections 1983, 1985(3) and 1986 against several defendants. The district court had original jurisdiction under 28 USC Section 1331 as respondent asserted a federal question. Respondent also asserted state law claims under the district court's pendent jurisdiction.[2]

Only one of respondent's claims is relevant to this petition. Respondent asserts a claim under Section 1983 that petitioners Frank Palermo and John Preston each issued a prison disciplinary report to him in retaliation for his having engaged in constitutionally protected activity. At all times relevant hereto, petitioner Frank Palermo was employed by the Department as a Corrections Lieutenant at LSP and petitioner John Preston was employed by the Department as a Corrections Sergeant at LSP.

Following discovery and an initial motion for summary judgment, the petitioners, on January 28, 1993, filed the second motion for summary judgment which raised

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[2] As the complaint was filed prior to December 1, 1990, 28 USC Section 1367 (supplemental jurisdiction) did not apply.

the issue presented here. In that second motion for summary judgment, the petitioners urged, *inter alia*, qualified immunity as a defense to respondent's Section 1983 retaliatory disciplinary report claim. In the context of qualified immunity, petitioners asserted that favorable termination of the underlying disciplinary report is an essential element of an inmate's Section 1983 retaliatory disciplinary report claim. For purposes of that second motion for summary judgment, it was undisputed that neither of the two disciplinary reports at issue was terminated in respondent's favor. Under the undisputed facts, respondent's claim failed on this essential element.[3] Accordingly, there was no "violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). Petitioners were therefore entitled to qualified immunity. Respondent did not oppose the second motion for summary judgment.[4]

For purposes of the second motion for summary judgment, the following facts were undisputed. On January 17, 1990 respondent was issued a disciplinary report by Corrections Lt. Frank Palermo charging a violation of Rule No. 3 – Defiance[5] for an incident which occurred

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[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

[4] Instead, respondent moved to dismiss the second motion for summary judgment on the grounds that the petitioners had filed a previous motion. The magistrate judge denied that request. No other opposition was filed.

[5] The *Disciplinary Rules and Procedures for Adult Prisoners* (1986 edition) were approved by the United States District Court for the Middle District of Louisiana in the ongoing class action lawsuit concerning the conditions in Louisiana's prisons.

late that morning. Later that same day, respondent was issued a second disciplinary report by Corrections Sgt. John Preston charging a violation of Rule No. 5 – Aggravated Disobedience[6] for an incident which occurred that evening.

Hayes Williams, et al. v. John J. McKeithen, et al., Civil Action No. 71-98-B (M.D. La.). A certified copy of the relevant portions of the *Disciplinary Rules* was submitted as an exhibit to petitioners' second motion for summary judgment.

Under the *Disciplinary Rules* (1986 edition) in effect at the time, Rule No. 3 – Defiance was defined as:

> "No prisoner shall commit or threaten physically or verbally to commit bodily harm upon an employee. No prisoner shall curse an employee or insult his family in the employee's presence. No prisoner shall threaten an employee in any manner, including threatening with legal redress during a confrontation situation (this does *not* mean telling an employee of planned legal redress outside a confrontation situation and certainly does not mean the actual composition or filing of a writ, suit, etc.; threatening to write to the Secretary, the Warden or other institutional officials is *not* a violation). No prisoner shall obstruct or resist an employee who is performing his proper duties. No prisoner shall try to intimidate an employee to make the employee do as the prisoner wants him to do."

[6] Under the *Disciplinary Rules and Procedures for Adult Prisoners* (1986 edition), Rule No. 5 – Aggravated Disobedience was defined as:

> "Prisoners must obey direct verbal orders cooperatively and promptly; not debate, argue, or ignore them before obeying. When orders conflict, the last order received must be obeyed. Even orders the prisoner believes improper must be obeyed; grievances must be pursued through proper channels. Sentences

On January 19, 1990 respondent appeared before the disciplinary board at LSP for a hearing on the two disciplinary reports. Respondent pleaded not guilty to both disciplinary reports. Respondent was found guilty by the disciplinary board on both reports. On the Rule No. 3 – Defiance charge, respondent was sentenced to ten (10) days isolation and a quarters change to Camp H. On the Rule No. 5 – Aggravated Disobedience charge, respondent was sentenced to four (4) weeks loss of canteen.

Under the *Disciplinary Rules and Procedures for Adult Prisoners* (1986 edition) in effect at the time, a disciplinary board conviction was appealable either to the prison warden or to the Secretary of the Department, depending upon the severity of the sentence. The conviction on the Rule No. 3 – Defiance charge was appealable to the Secretary. The conviction on the Rule No. 5 – Aggravated Disobedience charge was appealable to the warden of LSP. Respondent did not appeal his conviction on either disciplinary report.[7]

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imposed by the Disciplinary Officer or the Disciplinary Board are to be carried out by the prisoner. Prisoners are required to obey all conditions of the furlough/pass agreement, including returning on or before the designated time. The only valid excuse for DISOBEDIENCE or AGGRAVATED DISOBEDIENCE is when the *immediate* result of obedience would be bodily injury (this includes incapacity by virtue of a *certified* medical reason). Violations of duty status will apply to this rule as will a violation of an order from the Disciplinary Board."

[7] This was established by uncontested affidavits from corrections officials who administered the disciplinary appeal process.

Had respondent so appealed and the appeal been denied, he then had the right to seek judicial review in state district court under the Louisiana Administrative Procedures Act. La. R.S. 49:964. *State ex rel. Armistead v. Phelps*, 365 So.2d 468 (La. 1978); *McCrae v. Hankins*, 720 F.2d 863, 867 (5th Cir. 1983). An appeal from an adverse decision of the state district court could then be taken as in any other civil matter. La. R.S. 49:965.

Further, in the instant federal suit, respondent had the right to challenge the sufficiency of the evidence of his disciplinary board conviction under the "some basis in fact" or "any evidence in the record" test of *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454-56, 105 S.Ct. 2768, 2773-74, 86 L.Ed.2d 356 (1985). The district court found that he did not do this.[8]

On April 6, 1993 the magistrate judge issued a report concerning petitioners' second motion for summary judgment. Appendix C to this petition, p. App. 16. The magistrate judge recommended that the motion for summary judgment be denied on the Section 1983 retaliatory disciplinary report issue. Since the magistrate judge's report appeared to be silent on the disposition of the petitioners'

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[8] In the October 28, 1993 magistrate judge's report, the magistrate judge found: "A careful review of the plaintiff's original, first and second amended complaints showed that this claim was not raised by the plaintiff". Appendix D, p. App. 30. On January 3, 1994 the district judge adopted the magistrate judge's reports as the reasons for its ruling. Appendix B, p. App. 14. Petitioner did not file an objection to the October 28, 1993 magistrate judge's report.

qualified immunity defense, on April 21, 1993 the petitioners filed a motion for partial reconsideration, raising, *inter alia*, the disposition of their qualified immunity defense. On October 28, 1993 the magistrate judge issued a report on the petitioners' motion for partial reconsideration. Appendix D to this petition, p. App. 27. The magistrate judge renewed his recommendation that the second motion for summary judgment be denied on the Section 1983 retaliatory disciplinary report issue and specifically recommended that the qualified immunity defense be denied.

On November 16, 1993 the petitioners filed a timely objection to the magistrate judge's report. The petitioners specifically objected to the magistrate judge's recommendation that their qualified immunity defense be denied. On January 3, 1994 the district judge entered an opinion adopting the magistrate judge's reports of April 6, 1993 and October 28, 1993. Appendix B to this petition, p. App. 14.

On January 20, 1994 the petitioners filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit, appealing from the district judge's January 3, 1994 order. The Court of Appeals had jurisdiction to review the denial of the qualified immunity defense under the collateral order doctrine. *Mitchell v. Forsyth, Id.* After initial briefing by the parties, the Fifth Circuit appointed counsel to represent respondent and ordered supplemental briefing. The appeal was argued on January 5, 1995. On August 15, 1995 the Fifth Circuit issued a reported decision. *Woods v. Smith*, 60 F.3d 1161 (5th Cir. 1995). Appendix A to this petition, p. App. 1. The Court of Appeals affirmed the district court's denial of the

qualified immunity defense, finding that favorable termination was not an essential element of respondent's Section 1983 retaliatory disciplinary report claim. *Woods*, 60 F.3d at 1164-65. This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT CREATED A CONFLICT WITH THE EIGHTH CIRCUIT REGARDING WHETHER FAVORABLE TERMINATION OF THE UNDERLYING PRISON DISCIPLINARY REPORT IS AN ESSENTIAL ELEMENT OF AN INMATE'S SECTION 1983 RETALIATORY DISCIPLINARY REPORT CLAIM.

The United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with decisions of the Court of Appeals for the Eighth Circuit on the same important matter. Supreme Court Rule 10(a). This Court should grant certiorari to resolve this irreconcilable conflict that directly impacts state prison management.

A. The Fifth Circuit created a conflict with the Eighth Circuit on this issue.

The decision of the Fifth Circuit in this case, *Woods v. Smith*, 60 F.3d 1161 (5th Cir. 1995), is in direct and irreconcilable conflict with the decisions of the Eighth Circuit in *Henderson v. Baird*, 29 F.3d 464 (8th Cir. 1994), cert. denied,

___ U.S. ___, 115 S.Ct. 2584, 132 L.Ed.2d 833 (1995)[9] and *Earnest v. Courtney*, 64 F.3d 365 (8th Cir. 1995).[10] The Fifth Circuit's decision created a conflict between the circuits on this issue.

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[9] In that case, the Eighth Circuit held:

> "We also have held, however, that "no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform." *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990). Following *Orebaugh*, we recently stated that "if the discipline which the prisoner claims to have been retaliatory was in fact imposed for an actual violation of prisoner rules or regulations, then the prisoner's claim that the discipline was retaliatory in nature must fail." *Goff*[*v. Burton*], 7 F.3d[734,] at 738[(8th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2684, 129 L.Ed.2d 817 (1994)]."
>
> "We conclude that under the above authorities that Henderson's retaliation claim must fail. The prison disciplinary committee found that Henderson committed an actual violation of prison rules based on Officer Baird's description of the event. Because the finding was based on some evidence of the violation, the finding essentially checkmates his retaliation claim. *See Superintendent v. Hill*, 472 U.S. 445, 454-56, 105 S.Ct. 2768, 2773-75, 86 L.Ed.2d 356 (1985)."

Henderson, 29 F.3d at 469.

[10] In that case, the Eighth Circuit affirmed the district court's grant of summary judgment in favor of the defendant corrections officials on the plaintiff inmate's Section 1983 retaliatory disciplinary report claim. The inmate's retaliation claim was precluded because it was undisputed that the disciplinary conviction had not been favorably terminated and the disciplinary conviction was supported by "some evidence". *Earnest*, 64 F.3d at 367. *Earnest* was decided eight days after the Fifth Circuit decision in *Woods*, the review of which is sought here.

The Second Circuit raised the question generally without answering it. *Colon v. Coughlin*, 58 F.3d 865, 870 n. 3 (2nd Cir. 1995). The Fifth Circuit noted that other Circuits have developed a variety of analytical frameworks for such claims. *Woods*, 60 F.3d at 1165 n. 20 & n. 21.

Petitioners are unaware of any district courts outside the Fifth and Eighth Circuits that have ruled specifically on the favorable termination issue presented in this petition.

B. This issue is important to prison administration because the Fifth Circuit's decision departs from this Court's repeated command that prison administrators are to be afforded deference in matters of prison discipline and security.

This issue is important because the Fifth Circuit's ruling allows the courts to become intimately involved with the day-to-day management of prisons. Just last term, this Court repeated its caution to the district and appellate courts "to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, ___ U.S. ___, ___, 115 S.Ct. 2293, 2299-2300, 132 L.Ed.2d 418 (1995); citing *Wolff v. McDonnell*, 418 U.S. 539, 561-63, 94 S.Ct. 2963, 2977-78, 41 L.Ed.2d 935 (1974); *Hewitt v. Helms*, 459 U.S. 460, 470-71, 103 S.Ct. 864, 870-71, 74 L.Ed.2d 675 (1983); and

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125, 97 S.Ct. 2532, 2537-38, 53 L.Ed.2d 629 (1977).[11]

Under this Court's precedents, an inmate may accomplish favorable termination either: (1) in the state administrative and judicial process;[12] or (2) in federal court under Section 1983 by demonstrating that the disciplinary conviction violated the "some evidence" test of *Superintendent v. Hill*, 472 U.S. at 454-56, 105 S.Ct. at 2773-74.

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[11] See also: *Bell v. Wolfish*, 441 U.S. 520, 547-48, 99 S.Ct. 1861, 1878-79, 60 L.Ed.2d 447 (1979); *Meachum v. Fano*, 427 U.S. 215, 228-29, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976); *Pell v. Procunier*, 417 U.S. 817, 825-26, 94 S.Ct. 2800, 2805-06, 41 L.Ed.2d 495 (1974); and *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974).

[12] As discussed above, petitioner could have obtained favorable termination in state administrative and judicial proceedings in numerous ways. Petitioner had a hearing before the prison Disciplinary Board. He had the right to appeal the Defiance conviction to the Secretary and the Aggravated Disobedience conviction to the LSP Warden. He could have then appealed to the appropriate state district court. *Flowers v. Phelps*, 595 So.2d 668 (La. App. 1st Cir. 1991); *State ex rel. Armistead v. Phelps*, 365 So.2d 468 (La. 1978). Under Louisiana law, this action is treated the same as any other appeal of an adverse adjudication by a state agency. La. R.S. 15:1177 and 49:964. Petitioner could then seek appellate review as in any other civil action. La. R.S. 49:965. In civil cases, Louisiana appellate courts, due to their civilian rather than common law heritage, have appellate review of fact as well as of law. La. Const. Article 5, Section 5(C) (Supreme Court of Louisiana) and Section 10(B) (Louisiana Courts of Appeal).

In contrast, the Fifth Circuit's decision allows state prison inmates to litigate in an original federal proceeding, as a matter of substance, whether a disciplinary report was in fact "false". This allows an inmate to relitigate *de novo* his prison disciplinary board hearings. In the district court, an inmate would not be confined to a challenge under the "some evidence" test of *Superintendent v. Hill, Id.* An inmate would be able to retry the disciplinary charges brought against him. He would be allowed the full panoply of rights allowed to a civil litigant – rights far in excess of those rights this Court held in *Wolff v. McDonnell, Id.*, that an inmate is entitled to at a prison disciplinary board hearing. Such an assertion and such a result run completely counter to the rule, repeatedly announced by this Court and reaffirmed in *Sandin v. Conner, Id.*, that broad deference be accorded to prison administrators.

A favorable termination element does not abandon an inmate to the "tender mercies" of the reporting officers or even of the prison disciplinary board. It does not abandon him even to the prison warden or the Secretary of the Department. An inmate may seek review of the decision of the prison administrators both in Louisiana courts (where the standard of review is broader than the federal "some evidence" test under *Superintendent v. Hill, Id.*) and in federal court under the *Superintendent v. Hill, Id.*, standard.

In sum, if an inmate in a Louisiana prison could challenge a disciplinary conviction *only* within the prison

walls, the Fifth Circuit's concerns might be valid.[13] However, since an inmate may challenge the validity of his disciplinary conviction before the judiciary, both state and federal, those concerns are satisfied.

C. The Fifth Circuit's decision departs from the legal framework established by this Court for analyzing claims asserted under Section 1983.

The Fifth Circuit's holding departs from the analytical framework for Section 1983 claims recently reaffirmed by this Court in *Heck v. Humphrey*, ___ U.S. ___, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). This Court stated:

> We have repeatedly noted that 42 USC Section 1983 creates a species of tort liability. Over the centuries, the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal

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[13] The Fifth Circuit, in rejecting petitioner's claim, noted that:

> "Further, in a malicious prosecution claim, resolution of the underlying proceedings typically is within the province of a judge, jury, or senior prosecutor. This differs sharply from the procedures at bar where the disciplinary proceedings are conducted *solely* by corrections officials."

Woods v. Smith, 60 F.3d at 1165. (emphasis supplied).

The Fifth Circuit either misunderstood or misapplied the law. Louisiana inmates *always* have the right to seek review of a prison disciplinary conviction to the Louisiana courts. Additionally, inmates have an independent right to seek federal court review under *Superintendent v. Hill, Id.* This misunderstanding perhaps played a part in the Fifth Circuit's reaching the wrong conclusion.

> rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well. Thus, to determine whether there is any bar to the present suit, we look first to the common law of torts.
>
> *Heck*, ___ U.S. at ___, 114 S.Ct. at 2370-71. (citations and internal quotations omitted).

As in *Heck*, respondent's claim is analogous to the tort of malicious prosecution. Petitioner seeks to challenge as wrongful the prison disciplinary action taken against him. He should not be able to challenge the underlying motivations unless and until the disciplinary action itself is terminated in his favor. In the instant case, it is undisputed that there was not favorable termination of the disciplinary action against respondent.

Under the Fifth Circuit's holding, by the simple addition of the word "retaliation" to an inmate's complaint, the inmate will be able to transform a non-constitutional claim into a claim of constitutional dimension. Just last term, in *Sandin v. Conner, Id.*, this Court criticized the then-existing legal framework regarding state created liberty interests because it "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Sandin*, ___ U.S. at ___, 115 S.Ct. at 2299. Under the Fifth Circuit's holding, an inmate, simply by alleging retaliatory animus, may seek federal court review under Section 1983 of any prison disciplinary action even if the disciplinary hearing met the requirements prescribed by this Court in *Wolff v. McDonnell*, even if the evidence in support of conviction met the test set out by this Court in

Superintendent v. Hill, and even if the disciplinary action was never terminated in the inmate's favor.[14] The Fifth Circuit's decision, in practical effect, insulates all prison disciplinary claims from disposition by summary judgment, thereby forcing their ultimate resolution by trial on the merits in federal court.

Much like the situation this Court criticized in *Sandin*, the Fifth Circuit's ruling encourages inmates to file federal lawsuits over the ordinary incidents of prison life.[15]

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[14] And even if, as in this case, the inmate never appealed the disciplinary action administratively, much less to the state courts, and did not challenge the evidentiary sufficiency in federal court under *Superintendent v. Hill*.

[15] Of even more concern to prison administration is the class of inmate lawsuits which allege that the retaliation took place outside of the disciplinary context. Under the Fifth Circuit's framework, a whole host of inmate claims which this Court has held to fall outside of the protections of the Eighth Amendment are actionable if retaliatory animus is pleaded. Examples include: the *de minimis* use of force (cf. *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)); the denial of medical care which does not involve either deliberate indifference or an inmate's serious medical need (cf. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)); denial of humane conditions of confinement where the prison official lacks actual knowledge of a substantial risk of serious harm to the inmate (cf. *Farmer v. Brennan*, ___ U.S. ___, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

CONCLUSION

This Court denied review of the Eighth Circuit's *Goff* and *Henderson* decisions with which the Fifth Circuit's decision conflicts. This Court should exercise its discretion, hear this case, and resolve the conflict between the Fifth and Eighth Circuits. For the foregoing reasons, and on the basis of the authorities cited, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

A. August 15, 1995 opinion of the United States Court of Appeals for the Fifth Circuit, reported as *Woods v. Smith*, 60 F.3d 1161 (5th Cir.1995).....App. 1

B. January 3, 1994 opinion of the district judge (unreported).....App. 14

C. April 6, 1993 report of the magistrate judge (unreported).....App. 16

D. October 25, 1993 report of the magistrate judge (unreported).....App. 27

APPENDIX A

Claude E. WOODS, Plaintiff-Appellee, Cross-Appellant,

v.

Larry SMITH, et al., Defendants-Appellants, Cross-Appellees.

No. 94-30040.

United States Court of Appeals, Fifth Circuit.

Aug. 15, 1995.

Prisoner brought § 1983 action against prison officials, alleging that officials took disciplinary action against him in retaliation for his constitutional right of access to courts. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., denied defendants' summary judgment motion on basis of qualified immunity, and declined to dismiss state law claims against them. On appeal, the Court of Appeals, Politz, Chief Judge, held that: (1) prisoner was not required to establish that disciplinary proceedings were ultimately terminated in his favor to succeed in action; (2) Court of Appeals lacked jurisdiction on interlocutory appeal to consider trial court's refusal to dismiss pendent state law claims.

Affirmed in part, and dismissed in part.

Appeals from the United States District Court for the Middle District of Louisiana.

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:

On appeal is the partial grant of summary judgment in the civil rights action by Claude E. Woods, an inmate at the Louisiana State Penitentiary at Angola, against various corrections officials. Two officers appeal the denial of summary judgment on the basis of qualified immunity; two officers appeal the court's refusal to dismiss certain state law claims; Woods cross appeals the adverse summary judgment rulings. For the reasons assigned we affirm that part of the trial court's rulings over which we have interlocutory appellate jurisdiction and dismiss the appeals for that part of the rulings over which we lack that jurisdiction.

Background

Woods alleges that on January 14, 1990 corrections officer Sergeant Leon Daigrepont warned him that if he did not become an informant bad things would happen to him, including transfer to a less desirable part of the prison. On that day Woods reported the alleged threat by letter addressed to United States District Judge Frank J. Polozola, who was presiding over pending prison litigation, and to Larry Smith, the Warden of Angola.[1] Three days later Woods handed a copy of the letter to Lieutenant Frank Palermo with the request that he pass the copy to the shift supervisor. A few hours later Palermo

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[1] The letter was entitled *"RE: NOTICE OF ANTICIPATED CONSPIRACY TO COMMIT MALFEASANCE AND FALSIFY DOCUMENTS."* Woods wrote that "This notice is in an anticipation of future activities by Correctional Officer, Louisiana State Penitentiary at Angola, Leon DaigrePont, Sgt., respectfully."

informed Woods of the issuance of a disciplinary charge for defiance and that he would be placed in administrative lockdown.[2] The defiance was defined by Palermo as Woods' use of the referenced letter "to coerce [Palermo] into preventing Sgt. L. Daigrepont from doing his job."

Later that day Woods received a second disciplinary charge, this one signed by Sergeant John Preston, accusing Woods of refusing verbal orders to pack his belongings for the transfer to administrative segregation. Woods asserts that Captain Martin Regel and Lieutenant Palermo handed him the second disciplinary report while taunting him as he packed his bags. Woods alleges that Regel stated: "I know you know that we Security people stick together like you prisoners, didn't Sergeant Daigrepont tell you he gets what he wants?"; and Palermo added "This will make sure we don't see you around here for awhile." Woods was then removed to administrative lockdown.

Woods pled not guilty to both disciplinary charges. Following a hearing, the prison Disciplinary Board found him guilty and he was sentenced to four weeks loss of canteen, ten days isolation, and a change in quarters. Woods' efforts to pursue an administrative appeal foundered.[3]

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[2] The disciplinary report reflected 11:15 a.m. as the time of the incident. This was the approximate time Woods had asked that his letter be forwarded to the shift supervisor.

[3] Woods initiated two Administrative Remedy Procedures arising out of this matter. The appeals were rejected because the appropriate administrative remedy for disciplinary matters is the disciplinary process and the appeal procedures. The district

In April 1990 Woods filed the instant *pro se* complaint, invoking 42 U.S.C. §§ 1983, 1985(3), and 1986, against Smith, Palermo, Daigrepont, and Regel,[4] alleging *inter alia*, that the defendants conspired to issue false disciplinary reports in retaliation for his exercise of the constitutional right of access to the courts. Woods claimed that the acts directed toward him violated state law, as well as the first and fourteenth amendments to the Constitution. He amended his complaint to add as defendants Preston, Captain Mike Roberts, Harvey Grimmer, and Major Leslie Dupont. He sought monetary, declaratory, and injunctive relief.

The district court granted summary judgment on several of Woods' claims, including all made against the defendants in their official capacities. Finding the existence of genuine issues of material fact regarding whether Preston and Palermo issued the disciplinary reports for a retaliatory purpose, the court denied their motion for summary judgment on the basis of qualified immunity. Finally, the court declined to dismiss the remaining state law claims against Daigrepont, Regel, Palermo, Preston, Grimmer, and Roberts. The remaining defendants timely appealed and Woods cross-appealed.[5]

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court determined that Woods had attempted to exhaust his administrative remedies in good faith, under 42 U.S.C. § 1997e(a)(1).

[4] Regel was identified as John Doe in the initial complaint.

[5] The court dismissed Dupont and Smith after determining that they were not personally involved with the alleged constitutional torts. Woods does not appeal this dismissal.

Analysis

Preston and Palermo appeal the trial court's refusal to grant summary judgment on their qualified immunity defense, challenging the court's conclusions regarding the legal elements of the retaliation claim.[6] Faced with the purely legal question whether Woods' complaint stated a constitutional cause of action, we have jurisdiction to review this interlocutory judgment.[7] Woods contests our appellate jurisdiction, pointing to the trial court's finding of disputed issues of material fact. Collateral review would nonetheless be appropriate if we accept the defendants' contention that the disputed facts are not material to the essential issue of qualified immunity.[8]

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[6] The magistrate judge stated the necessary elements of a retaliation claim as: (1) a prison official acting under color of state law; and (2) intentional retaliation for the exercise of a constitutionally protected activity.

[7] *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (holding that the district court's denial of a claim of qualified immunity is appealable, to the extent that it turns on an issue of law.)

[8] *See Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (explaining that the issue of qualified immunity should be resolved at the earliest possible stage of litigation); *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir.1993) (explaining that collateral order jurisdiction does not exist if defense cannot prevail as a matter of law), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994); *Samaad v. City of Dallas*, 940 F.2d 925, 942 (5th Cir.1991) (finding jurisdiction to review, even though "the denial of qualified immunity ultimately turned on an issue of fact, the only reason that is so is that the court erroneously decided an issue of law.").

We review *de novo* the district court's denial of a summary judgment motion. Movants may prevail only if they have demonstrated that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law.[9] The defense of qualified immunity protects a public official from both litigation and liability, absent a showing that the official violated a constitutional right that was clearly established at the time of the incident.[10] In assessing the defense we must first inquire whether the plaintiff has asserted the violation of a clearly established constitutional right. If that inquiry is answered in the affirmative, we then determine whether the defendant's conduct was objectively reasonable in light of the established law.[11]

Woods avers that Palermo and Preston filed the two disciplinary reports in retaliation for his letter to Judge Polozola and Warden Smith. He maintains that these actions violated his right to be free from retaliation for the exercise of his first amendment right of access to the courts. The law of this circuit is clearly established, and was so in 1990 when the instant disciplinary charges issued, that a prison official may not retaliate against or harass an inmate for exercising the right of access to the courts, or for complaining to a supervisor about a guard's misconduct.[12] The defendants candidly concede that this

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[9] *Lampkin.*

[10] *Siegert v. Gilley,* 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

[11] *Spann v. Rainey,* 987 F.2d 1110 (5th Cir.1993).

[12] *Ruiz v. Estelle,* 679 F.2d 1115 (5th Cir.), *opinion amended in part and vacated in part,* 688 F.2d 266 (5th Cir.1982), *cert. denied,*

is a claim of constitutional proportions which is actionable under section 1983, but advance the proposition that Woods may not allege such a claim unless he first establishes that the underlying disciplinary proceedings were ultimately terminated in his favor.

We are not persuaded. Under this circuit's controlling precedents, favorable termination is not a requisite of a retaliatory interference claim.[13] Defendants rely heavily on an analogy with a section 1983 malicious prosecution claim where we have held favorable termination to be an element of the offense.[14] The two causes of action, however, have an essential difference. As we explained in *Brummett*, "[t]he essence of a malicious prosecution claim is a groundless prosecution."[15] Indeed, the focus of that action is the ultimate merit of the underlying proceeding. The retaliation claim, on the other hand, focuses on the interference, asking only whether there has been an obstruction of the exercise of a constitutional right.[16]

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460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); *Gibbs v. King*, 779 F.2d 1040 (5th Cir.), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 659 (1986); *Andrade v. Hauck*, 452 F.2d 1071 (5th Cir.1971).

[13] *But see Henderson v. Baird*, 29 F.3d 464 (8th Cir.1994) (effectively imposing a favorable termination requirement in this context), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2584, ___ L.Ed.2d ___ (1995).

[14] *Brummett v. Camble*, 946 F.2d 1178 (5th Cir.1991), *cert. denied*, 504 U.S. 965, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992). *See also Heck v. Humphrey*, 504 U.S. 965, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

[15] *Brummett*, 946 F.2d at 1183.

[16] This court has held that a prisoner must show favorable termination prior to bringing a section 1983 claim based simply

Further, in a malicious prosecution claim, resolution of the underlying proceedings typically is within the province of a judge, jury, or senior prosecutor. This differs sharply from the procedures at bar where the disciplinary proceedings are conducted solely by corrections officials. Mindful of that critical difference, we are not prepared to require a favorable termination before examining an otherwise legitimate constitutional complaint. Such a requirement would unfairly tempt corrections officers to enrobe themselves and their colleagues in what would be an absolute shield against retaliation claims.[17] This we will not do, for as we previously have stated, "the court with which [the inmate] sought contact, and not his jailer, will determine the merits of his claim."[18]

We emphasize that our concern is whether there was retaliation for the exercise of a constitutional right, separate and apart from the apparent validity of the underlying disciplinary report.[19] An action motivated by retaliation for the exercise of a constitutionally protected

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on the filing of a false disciplinary charge, absent an allegation of retaliatory interference with the exercise of a constitutional right. *Ordaz v. Martin*, 5 F.3d 529 (5th Cir.1993) (unpublished). Drawing an analogy with malicious prosecution, we reasoned that absent proof of favorable termination there was no arguable basis for finding the violation of a federally protected right. Such reasoning is inapplicable where a claim of constitutional dimension lies at the very core, however, of the complaint.

[17] *See Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir.1990) (Heaney, J., dissenting).

[18] *Andrade*, 452 F.2d at 1072.

[19] Compare these facts with those in *Ordaz*, where the petitioner's claim was based solely on the falsity of the disciplinary reports.

right is actionable, even if the act, when taken for a different reason, might have been legitimate.[20] Our inquiry today looks only to whether there has been a violation of a constitutional right. As our colleagues of the Seventh Circuit have held, proceedings that are not otherwise constitutionally deficient may be invalidated by retaliatory animus.[21] Our colleagues in the Eleventh Circuit have opined that an allegation of retaliatory disciplinary charges could give rise to either an independent section 1983 action or be part of a procedural due process review of the disciplinary hearing.[22]

Further, adding a favorable termination requirement in this setting would create the anomaly of establishing a more onerous exhaustion requirement for section 1983 actions than is required in habeas corpus proceedings. Unlike habeas claims, it is clearly settled that, except for

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[20] *See Mt. Healthy City School Board District Bd. of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir.1989); *Smith v. Maschner*, 899 F.2d 940 (10th Cir.1990); *Franco v. Kelly*, 854 F.2d 584 (2d Cir.1988).

[21] *Cain v. Lane*, 857 F.2d 1139 (7th Cir.1988). *See also Black v. Lane*, 22 F.3d 1395 (7th Cir.1994) (rejecting defendant's claim that filing of false disciplinary charges does not state a due process claim where procedural requirements are met and disciplinary action is supported by some evidence, because retaliatory issuance of false disciplinary charges can themselves amount to a violation of substantive due process); *Franco*, 854 F.2d at 589 (overturning district court's ruling that procedural due process in disciplinary proceeding could eliminate liability for intentional filing of false charges; the court explained that because the right of access to the courts is substantive rather than procedural, it "cannot be obstructed, regardless of the procedural means applied.").

[22] *Maschner.*

the limited exception Congress has established, exhaustion of state judicial or administrative remedies is not a prerequisite to the bringing of a section 1983 claim.[23] The effect of a favorable termination requirement could conceivably defer review of a civil rights action until the Supreme Court has reviewed a state adjudication, or precluding it altogether by denying a writ of certiorari.

While we remain fully supportive of the proposition that prison officials must have wide latitude in the control and disciplining of inmates, that "latitude does not encompass conduct that infringes on an inmate's substantive constitutional rights."[24] Within that limitation we intend no undue restriction of actions legitimately motivated by concerns of prison order and discipline. We agree with our colleagues of the Fourth Circuit when they cautioned:

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[23] *See* 42 U.S.C. § 1997e (conferring the district court with discretion to require an inmate to exhaust prison grievance procedures prior to having case heard in federal court); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

In *Patsy*, the Court considered section 1983's legislative history, and concluded that one reason Congress did not impose an exhaustion requirement was its belief "that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Id.* at 505, 102 S.Ct. at 2562. *See also McNeese v. Bd. of Educ.*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled in part on other grounds, Monell v. Dept. of Social Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[24] *Franco*, 854 F.2d at 590.

> The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.[25]

To assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them, trial courts must carefully scrutinize these claims. To state a claim of retaliation an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of incident – such as the filing of disciplinary reports as in the case at bar – would not have occurred.[26] This places a significant burden on the inmate. Mere conclusionary allegations of retaliation will not withstand a summary judgment challenge.[27] The inmate must produce direct evidence of motivation or, the more probable scenario, "allege a chronology of events from which retaliation may plausibly be inferred."[28] Although we decline to hold as a matter of law that a legitimate prison disciplinary report is an absolute bar to a discrimination claim, the existence of

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[25] *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1371, 131 L.Ed.2d 227 (1995).

[26] *Mt. Healthy; Maschner; Orebaugh* (Heaney, J., dissenting); *McDonald v. Hall*, 610 F.2d 16 (1st Cir.1979).

[27] *See Richardson v. McDonnell*, 841 F.2d 120 (5th Cir.1988) (upholding summary judgment dismissal of retaliation claim where inmate never offered documentary or testimonial evidence in support of assertions).

[28] *See Cain*, 857 F.2d at 1143 n. 6; *McDonald; Maschner.*

same, properly viewed, is probative and potent summary judgment evidence, as would be evidence of the number, nature, and disposition of prior retaliation complaints by the inmate.

Defendants Daigrepont and Regel contest the trial court's refusal to dismiss the remaining state law claims, observing that all federal claims against them have been dismissed. We lack jurisdiction to reach the merits of that appeal. Although the collateral order doctrine allows that review of the district court's denial of qualified immunity to Preston and Palermo, that allowance does not confer "pendent appellate jurisdiction" over the other issues.[29]

Nor can we derive jurisdiction from the fact that the defendants raise eleventh amendment immunity as a defense to the state law claims. Although the Court recently emphasized that denials of eleventh amendment

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[29] *See Swint v. Chambers County Commission*, ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) (finding no pendent party appellate jurisdiction where court based review on considerations of judicial economy); *McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 413 (5th Cir.1989) (refusing to find "so strange an animal as 'pendent party interlocutory appellate jurisdiction.' "), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990).

Although in *Swint* the Court implied that in rare circumstances pendent appellate jurisdiction may be proper – if issues were "inextricably intertwined" or where "review of the former was necessary to ensure meaningful review of the latter" – defendants have not advanced reasons for review more compelling than those rejected by the Court in *Swint*, ___ U.S. at ___, 115 S.Ct. at 1212. *See also Silver Star Enterprises, Inc. v. M/V Saramacca*, 19 F.3d 1008 (5th Cir.1994) (finding two orders not inextricably intertwined for purposes of pendent appellate jurisdiction).

immunity, like denials of qualified immunity, fall within the limited category of cases that warrant collateral review under *Cohen v. Beneficial Industrial Loan Corporation*,[30] we find no such denial here in the trial court's refusal to dismiss the state law claims. The judgment appealed, therefore, does not satisfy the *Cohen* requirement for collateral review.

Woods cross-appeals the district court's partial grant of summary judgment for the defendants. The defendants move to dismiss the cross-appeal because the district court's ruling was not a final appealable order. Agreeing that we have no jurisdiction to consider the court's interlocutory order, that motion is granted.[31]

The judgment denying summary judgment on the grounds of qualified immunity to Palermo and Preston is AFFIRMED. The other appeals and Woods' cross-appeal are DISMISSED for lack of appellate jurisdiction.

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[30] 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993).

[31] Fed.R.Civ.P. 54(b).

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLAUDE E. WOODS — CIVIL ACTION
VERSUS — NO. 90-356-B
LARRY SMITH, ET AL

OPINION

(Filed Jan. 3, 1994)

After independently reviewing the entire record in this case and for reasons set forth in the Apri1 6, 1993 Magistrate Judge's Report to which an objection and a motion for reconsideration were filed and to the October 25, 1993 Magistrate Judge's Report to which an objection was filed:

IT IS ORDERED that the plaintiff's claims against the defendants in their official capacities be DISMISSED.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment be GRANTED on the plaintiff's claims that: Daigrepont threatened to harm the plaintiff if he did not act as an informant; plaintiff was denied access to courts; plaintiff was denied due process when he was placed in administrative lockdown; plaintiff's due process rights were violated when the defendants failed to investigate Daigrepont's alleged wrongdoing; the disciplinary board imposed an excessive sentence; and that the defendants conspired to have the plaintiff locked up on false disciplinary charges.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment be GRANTED on the plaintiff's claim that his due process rights were violated when the disciplinary board members, Michael Roberts and Harvey Grimmer, failed to dismiss the disciplinary reports on the ground that the plaintiff was illegally placed in administrative lockdown.

IT IS FURTHER ORDERED that in all other respects defendants' motion for summary judgment be DENIED.

IT IS FURTHER ORDERED that the matter be referred back to Magistrate Judge for further proceedings.

Baton Rouge, Louisiana, Jan. 2, 1994.

/s/ Frank J Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT
JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CLAUDE E. WOODS

VERSUS

LARRY SMITH, ET AL

CIVIL ACTION

NO. 90-356-B

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. §636(b)(1), you have ten days from date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. A failure to object will constitute a waiver of your right to attack the factual findings on appeal.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, April 6, 1993.

/s/ Stephen C. Riedlinger
UNITED STATES MAGISTRATE
JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLAUDE E. WOODS
VERSUS
LARRY SMITH, ET AL

CIVIL ACTION
NO. 90-356-B

MAGISTRATE JUDGE'S REPORT

(Filed April 7, 1993)

This matter is before the court on the defendants' motion for summary judgment. The motion is not opposed.

Pro se plaintiff, an inmate at Louisiana State Penitentiary, Angola, Louisiana, filed this action pursuant to 42 U.S.C. §§1983, 1985 and 1986 against Larry Smith, Frank Palermo, Leon Daigrepont, John L. Preston, Martin Regel, Mike Roberts, Harvey Grimmer and Leslie Dupont.[1] Plaintiff alleged that Daigrepont threatened him; he was issued false disciplinary reports in retaliation for sending a letter to Judge Frank J. Polozola and Warden Larry Smith regarding the threats made against him by Daigrepont; he received an unfair disciplinary board hearing; and allegations of criminal wrongdoing were not investigated in accordance with institutional policy.

Defendants moved for summary judgment relying on a statement of undisputed facts, copies of the disciplinary reports issued to the plaintiff on January 17, 1990,

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[1] The claims against Larry Smith and Leslie Dupont were previously dismissed.

excerpts from the prison rule book, the affidavits of Dora Rabalais and Martin Regel and discovery responses.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. Supporting affidavits must set forth facts which would be admissible in evidence. Opposing responses must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Federal Rules of Civil Procedure.

Plaintiff brought this action against the defendants in their individual and official capacities. Section 1983 does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivations of civil liberties. Neither a state nor its officials acting in their official capacities are "persons" under section 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304 (1989).

Plaintiff alleged that: on January 14, 1990 Daigrepont threatened to have the plaintiff moved to another area of the prison if the plaintiff refused to act as an informant; plaintiff wrote a letter to Judge Frank J. Polozola and Warden Larry Smith advising them of Daigrepont's threats; on January 17, 1990, the plaintiff gave Palermo a copy of the letter he sent to the judge and warden and asked Palermo to give the copy to the shift supervisor; plaintiff was issued a disciplinary report for defiance; seven hours later Palermo advised the plaintiff that he was being placed in administrative lockdown; while packing his personal belongings Regel handed the plaintiff a second disciplinary report prepared by Preston for

aggravated disobedience; disciplinary board members Roberts and Grimmer refused to investigate the plaintiff's claim that Daigrepont engaged in criminal misconduct; Roberts and Grimmer refused to give the plaintiff a copy of his disciplinary report; Roberts and Grimmer failed to dismiss the charges against the plaintiff; and, Roberts and Grimmer imposed an excessive disciplinary sentence.

Regarding the threat from Daigrepont, the plaintiff specifically alleged that on January 14, 1990, Daigrepont approached the plaintiff about supplying information regarding who had drugs and contraband at the prison, but the plaintiff refused to act as an informant. Daigrepont then threatened to use his influence to have "something bad happen" to the plaintiff and to have the plaintiff moved to a different area of the prison.

Allegations of verbal abuse alone do not present claims under section 1983. "Mere threatening language and gestures of a custodial officer do not, even if true, amount to a constitutional violation." *McFadden v. Lucas*, 713 F.2d 143 (5th Cir.), *cert. denied*, 464 U.S. 998, 104 S.Ct. 499 (1983); *Burnette v. Phelps*, 621 F.Supp. 1157 (M.D. La. 1985); *Johnson v. Glick*, 481 F.2d 1028, 1033 n.7 (2d Cir. 1973). Classification of inmates in Louisiana is the duty of the Louisiana Department of Corrections and inmates have no right to a particular classification under state law. *McGruder v. Phelps*, 608 F.2d 1023 (5th Cir. 1979). The allegations against Daigrepont regarding verbal abuse and his threat to have the plaintiff moved to a different area of the prison are insufficient to support a constitutional violation.

As to Palermo and Preston, the plaintiff alleged that they violated his First Amendment rights of access to the courts by issuing the plaintiff false disciplinary reports in retaliation for writing a letter to Judge Polozola and Warden Smith complaining about Daigrepont's threats.

A substantive right of access to the courts has long been recognized. *Bounds v. Smith,* 430 U.S. 817, 821, 97 S.Ct. 1491, 1494 (1977). Access to the courts is protected by the First Amendment right to petition for redress of grievances. *Wilson v. Thompson,* 593 F.2d 1375 (5th Cir. 1979). That right has also been found in the Fourteenth Amendment guarantees of procedural and substantive due process. *Ryland v. Shapiro,* 708 F.2d 967, 971-75 (5th Cir. 1983).

In its most obvious and formal manifestation, the right protects one's physical access to the courts. Thus, for example, prison officials cannot refuse to transmit, or otherwise block, through procedural devices, the transmission of legal documents which prisoners wish to send to the courts. Nor can they take other actions--such as taking or destroying legal papers--that have a similar effect. *Crowder v. Sinyard,* 884 F.2d 804 (5th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 2617 (1990). Some showing of detriment caused by the challenged conduct must be made in order to succeed on a claim alleging a deprivation of the right to meaningful access to the courts. *Howland v. Kilquist,* 833 F.2d 639, 642 (7th Cir. 1987).

Plaintiff did not allege, nor is there any evidence that Palermo or Preston did anything to actually interfere

with the plaintiff's access to the courts. There are, however, factual issues in dispute as to whether the disciplinary reports were issued by Palermo and Preston for an unlawful retaliatory purpose.

The law is well settled that prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts. *Ruiz v. Estelle*, 679 F.2d 1115, 1153 (5th Cir.), *opinion amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438 (1983); *Gibbs v. King*, 779 F.2d 1040 (5th Cir. 1986). Nor may a prison guard harass an inmate in retaliation for the inmate complaining to supervisors about the guard's conduct. *Ruiz v. Estelle, supra, Gibbs v. King, supra.*

Although the mere issuance of a false disciplinary report does not amount to a denial of due process where the state provides an adequate procedure, *Collins v. King*, 743 F.2d 248 (5th Cir. 1984), the issuance of a fabricated disciplinary report, if done simply to retaliate against an inmate for his exercise of his constitutional rights, may violate plaintiff's substantive due process rights. *Jackson v. Cain*, 864 F.2d 1235 (5th Cir. 1989).

Defendants' argument that the plaintiff failed to allege that the defendants issued the plaintiff false disciplinary reports in retaliation for writing a letter to the judge and warden is without merit. Plaintiff specifically alleged in his verified complaint (record document no. 1) at p. 4, pph. 22, that the "defendants locked him up on disciplinary charges for writing a legal letter notifying Judge Polozola and Warden Smith of threats by fellow employee's [sic]".

It is clear that there are factual issues in dispute which preclude summary judgment on this issue.

Plaintiff alleged that his due process rights were violated when he was placed in administrative lockdown approximately seven hours after he committed the alleged offense.

Placement of an inmate in administrative segregation does not automatically trigger due process protection. *Hewitt v. Helms*, 459 U.S. 460, 468, 103 S.Ct. 864 (1983). There is no substantive due process right to avoid administrative segregation. However, placement without adequate procedural safeguards may violate due process if the state has created a protected liberty interest. *Id.* at 469-73. Due process requires only the procedural safeguards of notice, an opportunity to be heard within a reasonable time after pre-hearing detention, and an informal, nonadversary review of the evidence concerning the restrictive confinement. *McCrae v. Hankins*, 720 F.2d 863, 868 (5th Cir. 1983).

The summary judgment evidence showed that the plaintiff was notified of the charges against him and his impending placement in administrative lockdown on January 17, 1990. Plaintiff was brought before the disciplinary board two days later. The lapse of seven hours between the time the disciplinary report was written and his placement in administrative lockdown does not constitute a deprivation of the plaintiff's due process rights. Plaintiff received the requisite notice, opportunity to be heard, and informal, nonadversary review. Plaintiff's due process rights were not violated as a result of his placement in administrative lockdown.

Plaintiff alleged that he was not given notice of the charges against him 24 hours prior to the disciplinary board hearing. Defendants contended that the plaintiff did receive sufficient notice, but that even if he did not, his federal due process rights were not violated. Defendants argued that because the *Wolff* notice requirements were incorporated into the prison disciplinary rules, the failure to provide the plaintiff with adequate notice constituted no more than a deviation from the disciplinary rules.

In order to satisfy federal due process requirements the plaintiff had to be informed of the charges against him.[2] Since there are factual issues in dispute as to whether the plaintiff was properly informed of the charges against him prior to the disciplinary board hearing, summary judgment is inappropriate.

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[2] At the core of procedural due process is the guarantee of an opportunity to be heard and its corollary, adequate prior notice. The notice component includes not only information that a hearing is about to occur but information as to what the hearing will entail – including both the nature of the charges and the substance of the relevant supporting evidence. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263, 107 S.Ct. 1740, 1748 (1987) (Marshall, J., announcing judgment, joined by Blackmun, Powell and O'Connor, JJ.). Procedural due process rules are meant to protect persons not from the deprivation itself, but from the mistaken or unjustified deprivation of life, liberty or property. *Carey v. Phipus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050 (1978). A procedural due process violation may occur even though, for example, after a constitutionally adequate hearing the result would have been the same. *Id.*, at p. 266, 98 S.Ct. at 1053.

Plaintiff alleged that Mike Roberts and Harvey Grimmer further deprived him of a fair disciplinary board hearing when they refused to investigate the plaintiff's claims of misconduct by Daigrepont.

Roberts and Grimmer did not violate the plaintiff's due process rights by refusing to conduct an investigation into Daigrepont's alleged misconduct. *See generally, Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963 (1974). Defendants are entitled to summary judgment on this claim.

Plaintiff alleged that Roberts and Grimmer imposed an illegal sentence of 10 days isolation and custody change. Plaintiff alleged that the underlying charge did not allow for the imposition of such a sentence.

The United States Fifth Circuit Court of Appeals has determined that Louisiana has created an interest in being free from "extended lockdown" and that interest is protected by the federal due process clause. *See, McCrae v. Hankins,* 720 F.2d 863, 866-68 (5th Cir. 1983).

A review of the disciplinary report involving the defiance charge showed that the plaintiff was found guilty and sentenced to 10 days isolation and a quarters change to Camp H rather than a custody change as alleged by the plaintiff.

The **Disciplinary Rules and Procedures for Adult Prisoners** sets forth a penalty schedule and provides that a disciplinary board may impose one or two of the enumerated penalties. Plaintiff was found guilty of defiance by the disciplinary board. Defiance is a schedule B offense. The imposition of up to 10 days isolation and a quarters change are among the permissible penalties a

disciplinary board may impose for defiance. *See,* **Disciplinary Rules and Procedures for Adult Prisoners,** defendants' exhibit 3, p. 9. Plaintiff was moved from Walnut 4, a medium custody housing unit, to Camp H, also a medium custody housing unit. *See,* affidavit of Dora Rabalais, defendants' exhibit 4. Prior to his transfer to Camp H, the plaintiff was issued an incident report for threat to security. Plaintiff was found guilty of the charges and was ordered transferred to Camp J extended lockdown. *Id.* Plaintiff received a custody change based on an unrelated disciplinary charge. The summary judgment evidence showed that the plaintiff did not receive an excessive sentence. Defendants are entitled to summary judgment on this claim.

Plaintiff brought this action pursuant to 42 U.S.C. §§ 1983, 1985 and 1986. Plaintiff alleged that the defendants conspired to "lock him up on false [disciplinary] charges."

To establish a cause of action based on conspiracy a plaintiff must show that the defendants agreed to commit an illegal act. *Arseneaux v. Roberts,* 726 F.2d 1022 (5th Cir. 1982). The conspiracy allegations made by the plaintiff are conclusory, and more than a blanket of accusation is necessary to support a section 1983 claim. *Tower v. Glover,* 467 U.S. 914, 104 S.Ct. 2820 (1984); *Lynch v. Cannatella,* 810 F.2d 1363 (5th Cir. 1987); *Arseneaux v. Roberts, supra.*

An individual injured as a result of a conspiracy to interfere with the right of a person, or class of persons, to the equal protections of the laws has an action under 42 U.S.C. §1985. Subsections 2 and 3 of section 1985, relate only to actions motivated by racial or some other type of

invidious, class-based discrimination. *Daigle v. Gulf States Utilities Co., Local Union Number 2286,* 794 F.2d 974 (5th Cir. 1986); *Holdiness v. Stroud,* 808 F.2d 417 (5th Cir. 1987).

Plaintiff failed to allege that the defendants were motivated by racial or class-based discrimination. Therefore, the plaintiff's claims based on section 1985 fail to state a claim upon which relief can be granted. Where there is no section 1985 claim there can be no claim under section 1986. *See, Santistevan v. Loberidge,* 732 F.2d 116 (10th Cir. 1984).

RECOMMENDATION

It is the recommendation of the magistrate judge that the plaintiff's claims against the defendants in their official capacities be dismissed. It is further recommended that the defendants' motion for summary judgment be granted on the plaintiff's claims that: Daigrepont threatened to harm the plaintiff if he did not act as an informant; plaintiff was denied access to courts; plaintiff was denied due process when he was placed in administrative lockdown; plaintiff's due process rights were violated when the defendants failed to investigate Daigrepont's alleged wrongdoing; the disciplinary board imposed an excessive sentence; and that the defendants conspired to have the plaintiff locked up on false disciplinary charges, and in all other respects the defendants' motion for summary judgment be denied.

Baton Rouge, Louisiana, April 6, 1993.

/s/ Stephen C. Riedlinger
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLAUDE E. WOODS

CIVIL ACTION

VERSUS

NUMBER 90-356-B-1

LARRY SMITH, ET AL

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. § 636(b)(l), you have ten days from date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. A failure to object will constitute a waiver of your right to attack the factual findings on appeal.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, October 25, 1993.

/s/ Stephen C. Riedlinger
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLAUDE E. WOODS

VERSUS CIVIL ACTION

LARRY SMITH, ET AL NUMBER 90-356-B-1

RULING ON MOTION FOR RECONSIDERATION AND SUPPLEMENTAL MAGISTRATE JUDGE'S REPORT

(Filed Oct. 25, 1993)

This matter is before the court on the defendants' motion for partial reconsideration of the magistrate judge's report on the defendants' motion for summary judgment. Record document number 124. The motion is opposed.

Defendants argued that they are entitled to summary judgment on the plaintiff's claim that his Fourteenth Amendment due process rights were violated when he did not receive notice of the charges against him 24 hours prior to the disciplinary board hearing. Defendants argued that the failure to provide the plaintiff with adequate notice constituted no more than a random and unauthorized deviation from the prison disciplinary rules which could be redressed in state court and therefore did not give rise to a constitutional violation.

For the reasons set forth in the April 6, 1993 magistrate judge's report at page 7, record document number 124, this aspect of the defendants' motion for reconsideration is denied. Moreover, the incorporation of constitutional requirements into state laws and procedures cannot serve as the means to diminish the stature of those

requirements. If this were true, a state could avoid application of federal constitutional provisions by the simple act of declaring the state laws to be the same and then arguing that a violation of state law is not a constitutional violation.

Defendants argued that the magistrate judge's report did not address the plaintiff's claim that his due process rights were violated when the disciplinary board failed to dismiss the disciplinary report on the grounds that the plaintiff was illegally placed in administrative lockdown. Defendants conceded that the magistrate judge recommended that the plaintiff's claim that he was improperly placed in administrative lockdown be dismissed. *See,* magistrate judges report at p. 6, record document number 124.

Plaintiff alleged that defendants "[Michael] Roberts and [Harvey] Grimmer owed plaintiff the care and duty to dismiss and release plaintiff from unlawful and improper . . . placement in administrative segregation and failed to do so." Plaintiff's amended complaint at p. 2, pph. 4, record document number 13.

To the extent that the plaintiff's allegation may be construed to allege a denial of due process for failure to dismiss the disciplinary report as a result of the plaintiff's placement in administrative lockdown prior to the hearing, the claim should be dismissed. Plaintiff's due process rights were not violated as a result of his placement in administrative lockdown. *See,* magistrate judge's report at p. 7, record document number 124. Therefore, the failure to dismiss the disciplinary report on that ground did not violate the plaintiff's due process rights.

Defendants argued that the magistrate judge's report failed to address the plaintiff's claim that the disciplinary board incorrectly found him guilty.

A careful review of the plaintiff's original, first and second amended complaints showed that this claim was not raised by the plaintiff. Record document numbers 1, 2, and 13. This aspect of the defendants' motion for reconsideration is denied.

Defendants argued that the magistrate judge applied the wrong standard to the plaintiff's retaliation claim. Defendants argued that the standard to be applied to the plaintiff's retaliation claim is analogous to the standards applied to claims regarding false arrest and malicious criminal prosecution. Applying those standards to the plaintiff's factual allegations, the defendants argued that for the plaintiff to succeed on his retaliation claim he must prove that defendants Frank Palermo and John Preston knew the facts alleged in the incident reports were false and that the disciplinary board decision was favorable to the plaintiff.

As the Fifth Circuit Court of Appeals noted in its recent decision in *Doe v. State of Louisiana*, ___ F.2d ___ (No. 92-3144, 5th Cir., Oct. 4, 1993), it is unclear whether the tort of malicious prosecution states a claim for denial of civil rights under section 1983 where the malicious prosecution occurred in a civil proceeding. Assuming that the plaintiffs' allegations in that case supported the common law tort of malicious prosecution, the Fifth Circuit noted that the common law tort of misuse of legal procedure, without more, does not give rise to the level of constitutional wrong remedied by section 1983. *Doe*,

supra, citing Beker Phosphate Corporation v. Muirhead, 581 F.2d 1187, 1189 (5th Cir. 1978); *Cloutier v. Town of Epping,* 714 F.2d 1184, 1190 (1st Cir. 1983). Nevertheless, the court concluded that a claim of malicious prosecution may state a constitutional violation in some instances: "litigiousness which gives rise to a common law tort action for misuse of legal procedure may be so egregious as to constitutional [sic] a violation of § 1983 as well, if the tortfeasor, under color of state law, subjects the tort-victim to a deprivation of constitutional dimension." *Beker* at 1189. In reviewing the cases from other circuits addressing whether the initiation of legal proceedings was an egregious misuse of legal process, the court noted the case of *Kale v. Johnson,* 861 F.2d 943 (6th Cir. 1988), where the defendant, a prison official, planted drugs on the plaintiff, a prison inmate, for retaliatory purposes. Because the plaintiff in *Kale* was subject to the possibility of disciplinary action and a resulting loss of liberty, the Sixth Circuit held that the defendant's alleged conduct constituted an egregious abuse of governmental power and therefore the plaintiff's abuse of power claim adequately stated a constitutional claim actionable under section 1983.

Overall, however, the court concluded that plaintiff Doe's claim of malicious prosecution did not reach the level of a clearly established constitutional right at the time of the alleged unlawful conduct.

To whatever degree a claim of malicious prosecution does not yet, in this circuit, allege a violation of a clearly established constitutional right, it affords these defendants no relief. Plaintiff's complaint, fairly read, does not assert a claim for malicious prosecution. Clearly, he ties

his claim for retaliation to the defendants' alleged conduct aimed at interfering with and dissuading him from communicating with a judge of this court about threats made by another corrections officer, namely, Leon Daigrepont. The important difference between the plaintiff's retaliation claim and a malicious prosecution claim is that the malicious prosecution claim need not have as its predicate any motive to interfere with the exercise of a constitutional right.

Of the five factors urged by the defendants as elements of a retaliation claim, only the first two (prison official acting under color of state law and intentional retaliation for the exercise of a constitutionally protected activity) are necessary elements. The other three elements (issuance of a disciplinary report, which the official knows to be untrue and lacking in any reasonable basis, which is ultimately terminated in the inmate's favor) have not heretofore been required elements of a retaliation claim. Retaliation need not take the form of a disciplinary report. That is simply the method allegedly used in this case by defendants Palermo and Preston. Whether the report is true or has a reasonable basis, and whether the report is ultimately resolved in the inmate's favor, are more properly considered as evidence to refute the alleged retaliatory motive. This aspect of the defendants' motion for reconsideration is also denied.

In a related argument these defendants also contended that they are entitled to qualified immunity on the plaintiff's retaliation claim because a reasonable person would not have known that the issuance of a valid disciplinary report could result in a violation of the plaintiff's

civil rights. Defendants further argued that they are entitled to qualified immunity because the law is unsettled regarding the elements of a retaliation claim.

It is well established that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). The Supreme Court recently clarified the analytical structure for reviewing a claim of qualified immunity. *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789, 1793 (1991). A qualified immunity defense requires a two step analysis: the court must first determine whether the plaintiff has alleged the violation of a clearly established constitutional right, and if he has, then decide whether the official's conduct was objectively reasonable. This is because even if an official's conduct violated a constitutional right, he is entitled to qualified immunity if his actions were objectively reasonable given the clearly established law. *Id.; Salas v. Carpenter*, 980 F.2d 299, 305-06 (5th Cir. 1992); *Duckett v. City of Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992). A necessary prerequisite to the determination of whether the constitutional right alleged by the plaintiff is clearly established at the time the defendants acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. *Siegert, supra*. On a motion for summary judgment, under *Siegert* the court examines the plaintiffs' claims, taken as true, to determine whether they are sufficient to allege the existence of violations of clearly established constitutional rights, and then if constitutional violations are

alleged, addresses the issue of whether the defendants' conduct was objectively reasonable. *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 508 (5th Cir. 1992).

As previously noted, the plaintiff asserted that he was issued **false** disciplinary reports in retaliation for lodging complaints with Judge Polozola and the warden about Daigrepont's misconduct.[1] Defendants' attempt to engraft additional elements of proof onto the plaintiff's retaliation claim is not sufficient to support the argument that they are entitled to qualified immunity because the elements of a retaliation claim are not yet clearly established. Plaintiff has satisfied the first prong of the *Siegert* analysis by asserting facts, which if proven, are sufficient to support a violation of his constitutional rights. As to the plaintiff's allegations which are sufficient the court must determine whether the actions of Palermo and Preston were objectively reasonable. The summary judgment evidence submitted by the parties clearly shows that there are material facts genuinely in dispute. Whether Palermo and Preston are entitled to a qualified immunity defense cannot be determined where the underlying facts are genuinely disputed.

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[1] The law is well settled that prison officials may not retaliate against, or harass an inmate because of the inmate's exercise of his right of access to the courts. *Ruiz v. Estelle*, 679 F.2d 1115, 1153 (5th Cir.), *opinion amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438 (1983); *Gibbs v. King*, 779 F.2d 1040 (5th Cir. 1986). A prison guard may not harass an inmate in retaliation for the inmate complaining to supervisors about the guard's conduct. *Ruiz v. Estelle, supra, Gibbs v. King, supra.*

Defendants argued that the magistrate judge did not address the defendants' qualified immunity defense as to two of the plaintiff's other claims. Defendants argued that they are entitled to qualified immunity on the plaintiff's claims that: (1) the disciplinary board failed to dismiss the disciplinary report on the grounds that the plaintiff was improperly placed in administrative lockdown; and (2) the plaintiff was improperly placed in administrative lockdown.

Defendants' qualified immunity defense as to the plaintiff's failure to dismiss the disciplinary reports and placement in administrative lockdown claims do not need to be addressed since it is clear as a matter of fact and law that the defendants are otherwise entitled to summary judgment on these claims.

Finally, defendants Daigrepont and Regel urged the court to decline to exercise supplemental jurisdiction with regard to the plaintiff's state law claims against them in the event the federal claims are dismissed.

Plaintiff asserted state law claims against the defendants for falsifying documents, malfeasance, and abuse of office. Under 28 U.S.C. § 1367(a) the district court has supplemental jurisdiction over all other claims that are so related to the claims in the action within the court's original jurisdiction that they form a part of the same case or controversy under Article III of the United States Constitution. However, the district court may decline to exercise supplemental jurisdiction if the claim raises a novel or complex issue of state law, substantially predominates over the claim or claims over which the district court has original jurisdiction, all the claims over which it

has original jurisdiction have been dismissed, or there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). The elements of the plaintiff's state law claims have not been clearly articulated by either the plaintiff or the defendants. Clearly, all of the plaintiff's federal claims over which this court has original jurisdiction have not been dismissed nor has a recommendation been made to dismiss them all. It is unclear, at this time, whether the plaintiff's state law claims against Daigrepont and Regel would substantially predominate over the claims against the other defendants, in terms of either the factual or legal aspects of the claims against Daigrepont and Regel. Thus, at this time, the court should not decline the exercise of supplemental jurisdiction over the plaintiff's state law claims against Daigrepont and Regel.

RULING AND RECOMMENDATION

Accordingly, the defendants' motion for reconsideration is denied, with the following exception.

It is the recommendation of the magistrate judge that the defendants' motion for summary judgment (record document number 120) be granted on the plaintiff's claim that his due process rights were violated when the disciplinary board members, Michael Roberts and Harvey Grimmer, failed to dismiss the disciplinary reports on the ground that the plaintiff was illegally placed in administrative lockdown.

Baton Rouge, Louisiana, October 25, 1993.

/s/ Stephen C. Riedlinger
UNITED STATES
MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

NO. 95-743
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

FRANK PALERMO, *et al.*,
Petitioner

v.

CLAUDE E. WOODS,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICI CURIAE STATES OF PENNSYLVANIA, ALASKA, COLORADO, DELAWARE, IDAHO, MARYLAND, MISSISSIPPI, NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO, OKLAHOMA, VIRGINIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is favorable termination of the underlying prison disciplinary action against a state prison inmate an essential element of the inmate's Section 1983 retaliatory disciplinary report claim or is it merely one factor to be considered?

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INTEREST OF THE AMICI CURIAE

This brief in support of the Petition for Writ of Certiorari filed by prison officials of the Louisiana Department of Public Safety and Corrections is submitted on behalf of the Commonwealth of Pennsylvania and nine other States ("the Amici States") through their Attorneys General pursuant to Supreme Court Rule 37.5. The Amici States--which include Mississippi, a State with a large penal system and for whom the Fifth Circuit's ruling represents controlling law--have an important interest in this case because they are all responsible for defending, at substantial taxpayer expense, litigation commenced by prisoners incarcerated in the correctional facilities they operate. If left to stand and accepted by other courts, the Fifth Circuit's decision will hinder the speedy and efficient handling of this ever-increasing litigation, an increase that has imposed a double edged financial burden on the citizens of the Amici States. Not only have they had to defray the costs of defending the state officials sued, but they have also had to bear, on account of the taxes they pay to the United States, the costs of an expanding federal court system whose growth is attributable to the "deluge of prisoner suits." *See* Doumar, Robert G., *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 St. Louis U.Pub.L.Rev. 21 (1994).

REASONS FOR GRANTING THE PETITION

IF ALLOWED TO STAND THE FIFTH CIRCUIT'S DECISION WILL SIGNIFICANTLY--AND NEGATIVELY--AFFECT THE EXPENDITURE OF STATE AND FEDERAL RESOURCES AND THE OPERATION OF THE FEDERAL COURTS.

1. The Court of Appeals for the Fifth Circuit has declined to require favorable termination of prison disciplinary proceedings as a prerequisite to a civil rights claim that a misconduct report has been issued to a prisoner in retaliation for the exercise of some protected conduct. The court acknowledged that "[t]he prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties" and that "claims of retaliation must therefore be regarded with some skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions." Pet App. at 11 (quoting *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1371 (1995)). Despite espousing these sound principles and stating that "mere conclusionary allegations" of retaliation would not withstand a summary judgment challenge, the court nonetheless went on to say that all an inmate need do to defeat summary judgment is to "allege a chronology of events from which retaliation may plausibly be inferred" and specifically declined to hold that even a legitimate prison disciplinary report is an absolute bar to a retaliation claim. *Id.* at ___. In so doing, the court not only runs afoul of its own guiding principles and the principles of this Court, it has issued a holding which, if widely accepted, will have a

deleterious effect on the efficient handling of prisoner litigation by the states and by the federal courts.

Unlike other types of civil litigation, civil rights cases by prisoners have flooded the federal courts over the last thirty years. *See* Doumar, *supra*, 14 St. Louis. U.Pub.L.Rev. at ___, (quoting reports of the Administrative Office of the U.S. Courts, that there were 33,018 prisoner civil rights cases filed in 1993 compared to 818 in 1967). There are more prisoner cases filed in the United States District Courts than any other type of civil case. Nationwide, the prisoner cases represent 23.25% of the civil docket of the United States District Courts and 28.62% of the dockets of the Courts of Appeals. *Id.* A substantial portion of those cases seek to dispute discipline administered to inmates. This Court repeatedly has stressed that the federal courts do not sit in *de novo* review of disciplinary actions, *see, e.g., Superintendent v. Hill*, 472 U.S. 445, 455-57 (1985), and that it is not the province of the federal courts to enmesh themselves in day-to-day prison administration by "second-guessing" the decisions of prison disciplinary personnel. (*Id.* at 455). Once again reminding that "the federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment," just last Term the Court held that the administration of routine discipline does not give rise to a liberty interest which engenders the protections of due process. *See Sandin v. Conner*, ___ U.S. ___, 115 S.Ct. 2293, 2299 (1995) (citing *Wolff v. McDonnell*, 418 U.S. 539, 561-563 (1974); *Hewitt v. Helms*, 459 U.S. 460, 470-71 (1981); *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 125 (1977)). As a consequence of these decisions, claims by prisoners seeking to revisit the merits of disciplinary action typically are disposed of at the earliest stages of litigation with a comparatively minimal expenditure of resources by the defending States and the lower federal courts. Decisions like *Woods*, however, threaten this.

The Fifth Circuit's ruling in this case, if allowed to stand, and if widely accepted, will dramatically change the status quo and will undermine the salutary effects of the Court's decisions. Its decision effectively will permit a prisoner to circumvent these now well-settled principles by recasting his claim as one of retaliation, *i.e.*, that the discipline was issued in retaliation for his exercise of a constitutional right, and thereby to challenge the merits of the discipline. Under the Fifth Circuit's decision, a prisoner can accomplish this with nothing more than a bare assertion that there was a retaliatory motive for the disciplinary action.

Given that tens of thousands of disciplinary actions involving prisoners occur annually, the Fifth Circuit's ruling presents the potential for an enormous increase in discipline-related claims. Every disgruntled inmate could succeed in obtaining judicial review of disciplinary actions simply by adding an allegation in his complaint that he was the victim of retaliation. It is not unrealistic to expect that prisoners will avail themselves of this new avenue to placing their otherwise non-actionable claims before a federal court. To the contrary, "[p]risoners are notorious for bringing numerous . . . claims under 42 U.S.C. §1983." Levy, Tracey I., *Mandatory Disclosure: A Methodology for Reducing the Burden of* Pro Se *Prisoner Litigation*, 57 Alb.L.Rev. 487, 488 (1993) and the Chief Justice has observed that prisoner litigants have "a justified feeling that they have much to gain and virtually nothing to lose." *Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, C.J., dissenting). The existing liberal pleading standards applicable to these *pro se* litigants, moreover, aid in "abuse of the judicial process through the filing of claims in bad faith and for improper purposes." *Id.* at 504. "[M]any complaints are well worded by experienced jail-house lawyers who know what needs to be said to have their claim filed," *see*, Doumar, *supra*, 14 St. Louis. U.Pub.L.Rev. at ___. The upshot is that the states and their

taxpayers must shoulder the financial burdens imposed by these largely non-meritorious lawsuits.

The increased drain on resources of the States who will be obliged to defend these new claims, and of the courts which now must entertain them, can fairly be expected to be similarly substantial. In light of the potential impact that this decision likely will have on the States and the federal courts, the Amici States believe it is highly important that the Court address the question of whether the rule fashioned by the Fifth Circuit is sound. There is, we believe, serious reason to doubt that it is.

2. In failing to acknowledge that favorable termination of the underlying prison disciplinary proceedings is an essential element in any retaliation claim relating to inmate discipline, the Fifth Circuit has disregarded principles reiterated by this Court in its decisions in *Heck v. Humphrey*, ___ U.S. ___, 114 S.Ct. 2364, 2372-73 n.7 (1994); *Memphis Community School District v. Stachura*, 477 U.S. 209, 308 (1986); and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 all of which require evidence of an actual, compensable injury for relief under Section 1983. In each of those cases, which involved different constitutional causes of action, the Court concluded that there was no actual, compensable injury for Section 1983 purposes unless the conduct being challenged was found to have been unjustified. *Heck*, 114 S.Ct. at 2372-73 n.7; *Stachura*, 477 U.S. at 308; *Mt. Healthy City*, 429 U.S. at 287. Before the states are exposed to a new burden of defending prisoner lawsuits in which no injury is at stake, the Court should grant the pending petition of the Louisiana prison officials to determine whether this is the law and settle any uncertainties occasioned by the Fifth Circuit's decision.

3. In addition to its other undesirable effects, the Fifth Circuit's ruling can lead to the second guessing by federal courts of basic and routine decisions concerning inmate discipline and security, a result the Court has consistently condemned. As early as *Procunier v. Martinez*, 416 U.S. 396 (1972), *overruled on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court acknowledged the considerable importance, in analyzing inmate claims of First Amendment violations, of giving appropriate weight to "government interests in . . . preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Id.* at 142, and in *Hewitt v. Helms*, *supra*, the Court, quoting *Bell v. Wolfish*, 441 U.S. 520, 527 (1979), adverted to the "wide ranging deference" accorded prison officials in policies and practices intended to preserve internal order and discipline in prisons. 459 U.S. at 472. In the context of streamlining procedural safeguards to administrative confinement, the Court observed that "an administrator's judgment would probably be hindered" *id.* at 474, n.7 by more trial-like procedures and that, "prison officials, wary of potential legal liability, might well spend their time mechanically complying with cumbersome, marginally helpful procedural requirements, rather than managing their institution wisely." *Ibid.* Yet, this is just the consequence the Fifth Circuit's decision invites. Those responsible for issuing prisoners misconducts for inappropriate or dangerous behavior may hesitate to do so because of concerns about potential liability in litigation which claims that the misconduct was "retaliatory." This apprehension would likely compromise the safe and orderly operation of prisons because prison officers could make decisions as simple and necessary as when to cite an inmate for misconduct based on factors other than their expertise and detached professional judgment.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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No. 95-743

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FRANK PALERMO, et al.,

Petitioners,

v.

CLAUDE E. WOODS,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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26 pp

QUESTION PRESENTED

Whether termination of a prison disciplinary proceeding in favor of the prisoner is a requirement for a section 1983, 42 U.S.C. § 1983, action based on a claim of retaliatory interference with the claimant's civil rights.

LIST OF PARTIES

The petitioners are: Frank Palermo, John Preston, Michael Roberts, Harvey Grimmer, Leon Daigrepont, and Martin Regel.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Claude Woods, respectfully requests that this Court deny the petition for a writ of certiorari.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit is reported at 60 F.3d 1161 (5th Cir. 1995) and appears as Appendix A. The unpublished opinion and judgment of the United States District Court for the Middle District of Louisiana appears as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on August 15, 1995. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law ... abridging the freedom of speech, ... or the right of the people ... to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law ....

Title 42, Section 1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Claude Woods, an inmate at the Louisiana State Penitentiary at Angola (LSP), contends that on January 14, 1990, LSP Sergeant Leon Daigrepont told Woods that if he did not become an informant, he would be punished. (Appellate Record at 828). In response to these threats, Woods immediately wrote and mailed a letter to United States District Court Judge Frank Polozola and Warden Larry Smith notifying them of the threat from Sergeant Daigrepont. (Id.).

Three days later, Woods gave LSP Lieutenant Frank Palermo a copy of the letter he had sent to Judge Polozola and Warden Smith. (Id. at 829). Woods asked Lieutenant Palermo to forward the letter to the shift supervisor. (Id.). A few hours later, Lieutenant Palermo issued a disciplinary report to Woods for defiance and stated that Woods would be placed in administrative lockdown. (Id.). The defiance was defined by Lieutenant Palermo as using the letter "to coerce [Palermo] into preventing Sgt. L. Daigrepont from doing his job." (Id.).

While Woods was packing his personal property, Captain Martin Regel, Lieutenant Palermo, and Sergeant John Preston issued a second disciplinary report to Woods for aggravated disobedience. (Id.). Woods claims that Lieutenant Palermo stated that the second report was insurance that the officers would not see Woods for quite some time. (Id.). Woods was then transferred to administrative lockdown.

The Disciplinary Board that reviewed the reports was

composed of Captain Mike Roberts and Mr. Harvey Grimmer. (Appellate Record at 288). Woods plead not guilty to both disciplinary charges. (Id.). Following a hearing, the Disciplinary Board found Woods guilty and sentenced him to four weeks loss of canteen, ten days isolation, and a quarters change. (Id.). Woods' attempt to pursue an administrative appeal failed because he did not follow the correct procedures. (Id. at 798).

On April 27, 1990, Woods filed a pro se claim in the United States District Court for the Middle District of Louisiana alleging violations of 42 U.S.C. §§ 1983, 1985(3), and 1986. (Id. at 831). Woods also claimed that the illegal acts directed toward him by the prison employees violated state law, as well as the first and fourteenth amendments to the Constitution. (Id.).

On January 20, 1994, the district court granted summary judgment on several of the claims, including all the claims made against the prison employees in their official capacities. (Appendix B). Because genuine issues of material fact existed about whether Palermo and Preston issued the disciplinary reports for retaliatory purposes, the court denied their motion for summary judgment on the basis of qualified immunity. (Id.). The court also declined to dismiss the remaining state law claims against Daigrepont, Regel, Palermo, Preston, Grimmer, and Roberts. (Id.). The court dismissed Dupont and Smith because they were not personally involved with the alleged constitutional torts. (Id.).

The remaining defendants appealed and Woods cross-appealed. (Appellate Record at 1,3). On October 14, 1994, the undersigned counsel, Henry D. Gabriel, was appointed by the court to represent Woods. On August 15, 1995, the United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of summary judgment on the grounds of qualified immunity and dismissed the other appeals and Woods' cross-appeal for lack of appellate jurisdiction. (Appendix A).

REASONS FOR DENYING THE WRIT

I. The United States Court Of Appeals For The Fifth Circuit Correctly Held That Termination Of A Prison Disciplinary Proceeding In Favor Of The Prisoner Is Not A Requisite Of A Retaliatory Interference Claim Under 42 U.S.C. § 1983.

The United States Court of Appeals for the Fifth Circuit correctly held that termination of a prison disciplinary proceeding in favor of the prisoner is not a requisite of a retaliatory interference claim under 42 U.S.C. § 1983. Woods v. Smith, 60 F.3d 1161 (5th Cir. 1995). The Eighth Circuit is the only other circuit that has specifically addressed the issue and it has imposed a favorable termination requirement in this context. Henderson v. Baird, 29 F.3d 464 (8th Cir. 1994), cert. denied, 115 S.Ct. 2584 (1995); Earnest v. Courtney, 64 F.3d 365 (8th Cir. 1995). The Eighth Circuit, however, misperceives the relationship between a claim under section 1983 and the underlying disciplinary report.

The issue in a § 1983 retaliatory interference claim is whether there has been a violation of a constitutional right, not whether the underlying disciplinary report was valid. An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate. Mt. Healthy City School District Bd. of Education v. Doyle, 429 U.S. 274 (1977). Thus, a requirement that the disciplinary report be terminated in favor of the prisoner is inappropriate where a constitutional claim lies at the core of the complaint. The issue of whether there has been a violation of a constitutional right must be

decided by the courts, not by the defendant against whom the claim has been made. Woods, 60 F.3d at 1164-65.

The petitioners rely on an analogy with § 1983 malicious prosecution claims where favorable termination is an element of the offense. Heck v. Humphrey, 114 S.Ct. 2364 (1994). As the Fifth Circuit noted, this reliance is misplaced because a retaliatory interference claim is different from a malicious prosecution claim. Woods, 60 F.3d at 1165. The focus of a malicious prosecution claim is the ultimate merit of the underlying proceeding. The retaliation claim, on the other hand, focuses on the interference and whether there has been an obstruction of the exercise of a constitutional right. Id. This inquiry is separate from the underlying proceeding.

Furthermore, in a malicious prosecution claim, the underlying proceeding is decided by an independent judge or jury. In contrast, in this type of retaliatory interference claim, the underlying prison disciplinary proceedings are conducted by the correction officials against whom the claim is being brought. Thus, if termination of a disciplinary report in favor of the inmate is a required element, then the prison officials get to determine by their own acts whether they will be responsible to the prisoner. As the Fifth Circuit instructed, "the court with which [the prisoner] sought contact, and not his jailer, [must] determine the merits of his claim." Woods, 60 F.3d at 1165. Therefore, a requirement that the disciplinary report be terminated in favor of the prisoner is inappropriate in a § 1983

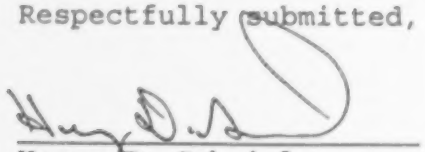
retaliatory interference claim.

The Fifth Circuit's decision does not interfere with the deference that should be afforded prison administrators in managing the prison. The Fifth Circuit expressly reaffirmed that prison officials must have wide latitude in the control and disciplining of inmates. Woods, 60 F.3d at 1166. See also Sandin v. Conner, 115 S.Ct. 2293, 2299 (1995). However, as the Fifth Circuit properly noted, this wide latitude "does not encompass conduct that infringes on an inmate's substantive constitutional rights." Woods, 60 F.3d at 1166. To assure that no undue restrictions are placed on actions legitimately motivated by concerns of prison order and discipline, while still ensuring the protection of substantive constitutional rights, the Fifth Circuit properly concluded that retaliatory interference claims are to be "carefully scrutinized" and inmates must allege a violation of a specific constitutional right. Id.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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December, 1995.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Appendix A

Claude E. WOODS, Plaintiff-Appellee, Cross-Appellant,

v.

Larry SMITH, et al., Defendants-Appellants, Cross-Appellees.

No. 94-30010.

United States Court of Appeals, Fifth Circuit.

Aug. 15, 1995.

Prisoner brought § 1983 action against prison officials, alleging that officials took disciplinary action against him in retaliation for his constitutional right of access to courts. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., denied defendants' summary judgment motion on basis of qualified immunity, and declined to dismiss state law claims against them. On appeal, the Court of Appeals, Politz, Chief Judge, held that: (1) prisoner was not required to establish that disciplinary proceedings were ultimately terminated in his favor to succeed in action; (2) Court of Appeals lacked jurisdiction on interlocutory appeal to consider trial court's refusal to dismiss pendent state law claims.

Affirmed in part, and dismissed in part.

1. Federal Courts ⇐579

Court of Appeals had jurisdiction to review interlocutory appeal from trial court's refusal to grant summary judgment to defendants in § 1983 action on basis of qualified immunity, since issue was purely legal question. 42 U.S.C.A § 1983.

2. Federal Courts ⇐776

Court of Appeals reviews de novo trial court's denial of summary judgment motion. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3. Federal Civil Procedure ⇐2470, 2470.4

Movants for summary judgment may prevail only if they have demonstrated that there are no genuine issues of material fact and that they are entitled to summary judgment as matter of law. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

4. Civil Rights ⇐214(2)

Defense of qualified immunity protects public official from both litigation and liability, absent showing that official violated constitutional right that was clearly established at time of incident.

5. Civil Rights ⇐214(2)

In assessing defense of qualified immunity, Court of Appeals must first inquire whether plaintiff has asserted violation of clearly established constitutional right, and if that inquiry is answered in affirmative, Court of Appeals then determines whether defendant's conduct was objectively reasonable in light of established law.

6. Prisons ⇐4(10.1), 13(4)

Prison official may not retaliate against or harass inmate for exercising right of access to courts, or for complaining to supervisor about guard's misconduct.

7. Civil Rights ⇐135

Termination of prison disciplinary proceeding in favor of prisoner is not requisite of retaliatory interference claim.

8. Civil Rights ⇐135

Prison disciplinary action motivated by retaliation for prisoner's exercise of constitu-

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tionally protected right is actionable, even if act, when taken for different reason, might have been legitimate.

9. Civil Rights ⇐135

To state claim of retaliation, inmate must allege violation of specific constitutional right and be prepared to establish that but for retaliatory motive, complained of incident would not have occurred.

10. Civil Rights ⇐235(7)

In action by prisoner for retaliation by prison officials for prisoner's exercise of constitutional right, mere conclusionary allegations of retaliation will not withstand summary judgment challenge, but rather, inmate must produce direct evidence of retaliatory motivation, or allege chronology of events from which retaliation may plausibly be inferred.

11. Federal Courts ⇐770

Court of Appeals lacked jurisdiction to consider, on interlocutory appeal of denial of qualified immunity to prison officials in § 1983 action, trial court's refusal to dismiss pendent state law claims against other prison officials, even though all federal claims against them had been dismissed.

12. Federal Courts ⇐574

Court of Appeals did not have jurisdiction to consider whether trial court's refusal to dismiss state law claims against prison officials was proper on basis that officials raised Eleventh Amendment immunity as defense to state claims so as to fall within limited category of cases that warrant collateral review, where trial court did not deny such a claim of immunity in its refusal to dismiss state claims. U.S.C.A. Const.Amend. 11.

Appeals from the United States District Court for the Middle District of Louisiana.

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:

On appeal is the partial grant of summary judgment in the civil rights action by Claude E. Woods, an inmate at the Louisiana State Penitentiary at Angola, against various corrections officials. Two officers appeal the denial of summary judgment on the basis of qualified immunity; two officers appeal the court's refusal to dismiss certain state law claims; Woods cross appeals the adverse summary judgment rulings. For the reasons assigned we affirm that part of the trial court's rulings over which we have interlocutory appellate jurisdiction and dismiss the appeals for that part of the rulings over which we lack that jurisdiction.

Background

Woods alleges that on January 14, 1990 corrections officer Sergeant Leon Daigrepont warned him that if he did not become an informant bad things would happen to him, including transfer to a less desirable part of the prison. On that day Woods reported the alleged threat by letter addressed to United States District Judge Frank J. Polozola, who was presiding over pending prison litigation, and to Larry Smith, the Warden of Angola.[1]

1. The letter was entitled *"RE: NOTICE OF ANTICIPATED CONSPIRACY TO COMMIT MALFEASANCE AND FALSIFY DOCUMENTS."* Woods wrote that "This notice is in an anticipation of future activities by Correctional Officer, Louisiana State Penitentiary

Three days later Woods handed a copy of the letter to Lieutenant Frank Palermo with the request that he pass the copy to the shift supervisor. A few hours later Palermo informed Woods of the issuance of a disciplinary charge for defiance and that he would be placed in administrative lockdown.[2] The defiance was defined by Palermo as Woods' use of the referenced letter "to coerce [Palermo] into preventing Sgt. L. Daigrepont from doing his job."

Later that day Woods received a second disciplinary charge, this one signed by Sergeant John Preston, accusing Woods of refusing verbal orders to pack his belongings for the transfer to administrative segregation. Woods asserts that Captain Martin Regel and Lieutenant Palermo handed him the second disciplinary report while taunting him as he packed his bags. Woods alleges that Regel stated: "I know you know that we Security people stick together like you prisoners, didn't Sergeant Daigrepont tell you he gets what he wants?"; and Palermo added "This will make sure we don't see you around here for awhile." Woods was then removed to administrative lockdown.

Woods pled not guilty to both disciplinary charges. Following a hearing, the prison Disciplinary Board found him guilty and he was sentenced to four weeks loss of canteen, ten days isolation, and a change in quarters. Woods' efforts to pursue an administrative appeal foundered.[3]

In April 1990 Woods filed the instant *pro se* complaint, invoking 42 U.S.C. §§ 1983, 1985(3), and 1986, against Smith, Palermo, Daigrepont, and Regel,[4] alleging *inter alia*, that the defendants conspired to issue false disciplinary reports in retaliation for his exercise of the constitutional right of access to the courts. Woods claimed that the acts directed toward him violated state law, as well as the first and fourteenth amendments to the Constitution. He amended his complaint to add as defendants Preston, Captain Mike Roberts, Harvey Grimmer, and Major Leslie Dupont. He sought monetary, declaratory, and injunctive relief.

The district court granted summary judgment on several of Woods' claims, including all made against the defendants in their official capacities. Finding the existence of genuine issues of material fact regarding whether Preston and Palermo issued the disciplinary reports for a retaliatory purpose, the court denied their motion for summary judgment on the basis of qualified immunity. Finally, the court declined to dismiss the remaining state law claims against Daigrepont, Regel, Palermo, Preston, Grimmer, and Roberts. The remaining defendants timely appealed and Woods cross-appealed.[5]

Analysis

[1] Preston and Palermo appeal the trial court's refusal to grant summary judgment

at Angola, Leon DaigrePont, Sgt., respectfully."

2. The disciplinary report reflected 11:15 a.m. as the time of the incident. This was the approximate time Woods had asked that his letter be forwarded to the shift supervisor.

3. Woods initiated two Administrative Remedy Procedures arising out of this matter. The appeals were rejected because the appropriate administrative remedy for disciplinary matters is the disciplinary process and the appeal procedures. The district court determined that Woods had attempted to exhaust his administrative remedies in good faith, under 42 U.S.C. § 1997e(a)(1).

4. Regel was identified as John Doe in the initial complaint.

5. The court dismissed Dupont and Smith after determining that they were not personally involved with the alleged constitutional torts. Woods does not appeal this dismissal.

on their qualified immunity defense, challenging the court's conclusions regarding the legal elements of the retaliation claim.[6] Faced with the purely legal question whether Woods' complaint stated a constitutional cause of action, we have jurisdiction to review this interlocutory judgment.[7] Woods contests our appellate jurisdiction, pointing to the trial court's finding of disputed issues of material fact. Collateral review would nonetheless be appropriate if we accept the defendants' contention that the disputed facts are not material to the essential issue of qualified immunity.[8]

[2-5] We review *de novo* the district court's denial of a summary judgment motion. Movants may prevail only if they have demonstrated that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law.[9] The defense of qualified immunity protects a public official from both litigation and liability, absent a showing that the official violated a constitutional right that was clearly established at the time of the incident.[10] In assessing the defense we must first inquire whether the plaintiff has asserted the violation of a clearly established constitutional right. If that inquiry is answered in the affirmative, we then determine whether the defendant's conduct was objectively reasonable in light of the established law.[11]

[6] Woods avers that Palermo and Preston filed the two disciplinary reports in retaliation for his letter to Judge Polozola and Warden Smith. He maintains that these actions violated his right to be free from retaliation for the exercise of his first amendment right of access to the courts. The law of this circuit is clearly established, and was so in 1990 when the instant disciplinary charges issued, that a prison official may not retaliate against or harass an inmate for exercising the right of access to the courts, or for complaining to a supervisor about a guard's misconduct.[12] The defendants candidly concede that this is a claim of constitutional proportions which is actionable under section 1983, but advance the proposition that Woods may not allege such a claim unless he first establishes that the underlying disciplinary

6. The magistrate judge stated the necessary elements of a retaliation claim as: (1) a prison official acting under color of state law; and (2) intentional retaliation for the exercise of a constitutionally protected activity.

7. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (holding that the district court's denial of a claim of qualified immunity is appealable, to the extent that it turns on an issue of law.)

8. *See Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (explaining that the issue of qualified immunity should be resolved at the earliest possible stage of litigation); *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir.1993) (explaining that collateral order jurisdiction does not exist if defense cannot prevail as a matter of law), *cert. denied*, — U.S. —, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994); *Samaad v. City of Dallas*, 940 F.2d 925, 942 (5th Cir.1991) (finding jurisdiction to review, even though "the denial of qualified immunity ultimately turned on an issue of fact, the only reason that is so is that the court erroneously decided an issue of law.").

9. *Lampkin*.

10. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

11. *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993).

12. *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *opinion amended in part and vacated in part*, 688 F.2d 266 (5th Cir.1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); *Gibbs v. King*, 779 F.2d 1040 (5th Cir.), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 659 (1986); *Andrade v. Hauck*, 452 F.2d 1071 (5th Cir.1971).

proceedings were ultimately terminated in his favor.

[7] We are not persuaded. Under this circuit's controlling precedents, favorable termination is not a requisite of a retaliatory interference claim.[13] Defendants rely heavily on an analogy with a section 1983 malicious prosecution claim where we have held favorable termination to be an element of the offense.[14] The two causes of action, however, have an essential difference. As we explained in *Brummett*, "[t]he essence of a malicious prosecution claim is a groundless prosecution."[15] Indeed, the focus of that action is the ultimate merit of the underlying proceeding. The retaliation claim, on the other hand, focuses on the interference, asking only whether there has been an obstruction of the exercise of a constitutional right.[16]

Further, in a malicious prosecution claim, resolution of the underlying proceedings typically is within the province of a judge, jury, or senior prosecutor. This differs sharply from the procedures at bar where the disciplinary proceedings are conducted solely by corrections officials. Mindful of that critical difference, we are not prepared to require a favorable termination before examining an otherwise legitimate constitutional complaint. Such a requirement would unfairly tempt corrections officers to enrobe themselves and their colleagues in what would be an absolute shield against retaliation claims.[17] This we will not do, for as we previously have stated, "the court with which [the inmate] sought contact, and not his jailer, will determine the merits of his claim."[18]

[8] We emphasize that our concern is whether there was retaliation for the exercise of a constitutional right, separate and apart from the apparent validity of the underlying disciplinary report.[19] An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate.[20] Our inquiry today looks only to whether there has been a violation of a constitutional right. As our colleagues of the Seventh Circuit have held, proceedings that are not otherwise constitutionally deficient may be invalidated by

13. *But see Henderson v. Baird*, 29 F.3d 464 (8th Cir.1994) (effectively imposing a favorable termination requirement in this context), *cert. denied*, — U.S. —, 115 S.Ct. 2584, — L.Ed.2d — (1995).

14. *Brummett v. Camble*, 946 F.2d 1178 (5th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992). *See also Heck v. Humphrey*, 504 U.S. 965, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

15. *Brummett*, 946 F.2d at 1183.

16. This court has held that a prisoner must show favorable termination prior to bringing a section 1983 claim based simply on the filing of a false disciplinary charge, absent an allegation of retaliatory interference with the exercise of a constitutional right. *Ordaz v. Martin*, 5 F.3d 529 (5th Cir.1993) (unpublished). Drawing an analogy with malicious prosecution, we reasoned that absent proof of favorable termination there was no arguable basis for finding the violation of a federally protected right. Such reasoning is inapplicable where a claim of constitutional dimension lies at the very core, however, of the complaint.

17. *See Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir.1990) (Heaney, J., dissenting).

18. *Andrade*, 452 F.2d at 1072.

19. Compare these facts with those in *Ordaz*, where the petitioner's claim was based solely on the falsity of the disciplinary reports.

20. *See Mt. Healthy City School Board District Bd. of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir.1989); *Smith v. Maschner*, 899 F.2d 940 (10th Cir.1990); *Franco v. Kelly*, 854 F.2d 584 (2d Cir.1988).

retaliatory animus.[21] Our colleagues in the Eleventh Circuit have opined that an allegation of retaliatory disciplinary charges could give rise to either an independent section 1983 action or be part of a procedural due process review of the disciplinary hearing.[22]

Further, adding a favorable termination requirement in this setting would create the anomaly of establishing a more onerous exhaustion requirement for section 1983 actions than is required in habeas corpus proceedings. Unlike habeas claims, it is clearly settled that, except for the limited exception Congress has established, exhaustion of state judicial or administrative remedies is not a prerequisite to the bringing of a section 1983 claim.[23] The effect of a favorable termination requirement could conceivably defer review of a civil rights action until the Supreme Court has reviewed a state adjudication, or precluding it altogether by denying a writ of certiorari.

While we remain fully supportive of the proposition that prison officials must have wide latitude in the control and disciplining of inmates, that "latitude does not encompass conduct that infringes on an inmate's substantive constitutional rights."[24] Within that limitation we intend no undue restriction of actions legitimately motivated by concerns of prison order and discipline. We agree with our colleagues of the Fourth Circuit when they cautioned:

> The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.[25]

[9, 10] To assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them, trial courts must carefully scrutinize these claims. To state a claim of retaliation an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of inci-

21. *Cain v. Lane*, 857 F.2d 1139 (7th Cir.1988). *See also Black v. Lane*, 22 F.3d 1395 (7th Cir.1994) (rejecting defendant's claim that filing of false disciplinary charges does not state a due process claim where procedural requirements are met and disciplinary action is supported by some evidence, because retaliatory issuance of false disciplinary charges can themselves amount to a violation of substantive due process); *Franco*, 854 F.2d at 589 (overturning district court's ruling that procedural due process in disciplinary proceeding could eliminate liability for intentional filing of false charges; the court explained that because the right of access to the courts is substantive rather than procedural, it "cannot be obstructed, regardless of the procedural means applied.").

22. *Maschner*.

23. *See* 42 U.S.C. § 1997e (conferring the district court with discretion to require an inmate to exhaust prison grievance procedures prior to having case heard in federal court); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

In *Patsy*, the Court considered section 1983's legislative history, and concluded that one reason Congress did not impose an exhaustion requirement was its belief "that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Id.* at 505, 102 S.Ct. at 2562. *See also McNeese v. Bd. of Educ.*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled in part on other grounds, Monell v. Dept. of Social Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

24. *Franco*, 854 F.2d at 590.

25. *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994), *cert. denied*, — U.S. —, 115 S.Ct. 1371, 131 L.Ed.2d 227 (1995).

dent—such as the filing of disciplinary reports as in the case at bar—would not have occurred.[26] This places a significant burden on the inmate. Mere conclusionary allegations of retaliation will not withstand a summary judgment challenge.[27] The inmate must produce direct evidence of motivation or, the more probable scenario, "allege a chronology of events from which retaliation may plausibly be inferred."[28] Although we decline to hold as a matter of law that a legitimate prison disciplinary report is an absolute bar to a discrimination claim, the existence of same, properly viewed, is probative and potent summary judgment evidence, as would be evidence of the number, nature, and disposition of prior retaliation complaints by the inmate.

[11] Defendants Daigrepont and Regel contest the trial court's refusal to dismiss the remaining state law claims, observing that all federal claims against them have been dismissed. We lack jurisdiction to reach the merits of that appeal. Although the collateral order doctrine allows that review of the district court's denial of qualified immunity to Preston and Palermo, that allowance does not confer "pendent appellate jurisdiction" over the other issues.[29]

[12] Nor can we derive jurisdiction from the fact that the defendants raise eleventh amendment immunity as a defense to the state law claims. Although the Court recently emphasized that denials of eleventh amendment immunity, like denials of qualified immunity, fall within the limited category of cases that warrant collateral review under *Cohen v. Beneficial Industrial Loan Corporation*,[30] we find no such denial here in the trial court's refusal to dismiss the state law claims. The judgment appealed, therefore, does not satisfy the *Cohen* requirement for collateral review.

Woods cross-appeals the district court's partial grant of summary judgment for the defendants. The defendants move to dismiss the cross-appeal because the district court's ruling was not a final appealable order. Agreeing that we have no jurisdiction to consider the court's interlocutory order, that motion is granted.[31]

26. *Mt. Healthy; Maschner; Orebaugh* (Heaney, J., dissenting); *McDonald v. Hall*, 610 F.2d 16 (1st Cir.1979).

27. *See Richardson v. McDonnell*, 841 F.2d 120 (5th Cir.1988) (upholding summary judgment dismissal of retaliation claim where inmate never offered documentary or testimonial evidence in support of assertions).

28. *See Cain*, 857 F.2d at 1143 n. 6; *McDonald; Maschner*.

29. *See Swint v. Chambers County Commission*, — U.S. —, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) (finding no pendent party appellate jurisdiction where court based review on considerations of judicial economy); *McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 413 (5th Cir.1989) (refusing to find "so strange an animal as 'pendent party interlocutory appellate jurisdiction.' "), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990).

Although in *Swint* the Court implied that in rare circumstances pendent appellate jurisdiction may be proper—if issues were "inextricably intertwined" or where "review of the former was necessary to ensure meaningful review of the latter"—defendants have not advanced reasons for review more compelling than those rejected by the Court in *Swint*, — U.S. at —, 115 S.Ct. at 1212. *See also Silver Star Enterprises, Inc. v. M/V Saramacca*, 19 F.3d 1008 (5th Cir.1994) (finding two orders not inextricably intertwined for purposes of pendent appellate jurisdiction).

30. 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, — U.S. —, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993).

31. Fed.R.Civ.P. 54(b).

The judgment denying summary judgment on the grounds of qualified immunity to Palermo and Preston is AFFIRMED. The other appeals and Woods' cross-appeal are DISMISSED for lack of appellate jurisdiction.

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Appendix B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CLAUDE E. WOODS

VERSUS

LARRY SMITH, ET AL

CIVIL ACTION

NO. 90-356-B

O P I N I O N

After independently reviewing the entire record in this case and for reasons set forth in the April 6, 1993 Magistrate Judge's Report to which an objection and a motion for reconsideration were filed and to the October 25, 1993 Magistrate Judge's Report to which an objection was filed:

IT IS ORDERED that the plaintiff's claims against the defendants in their official capacities be DISMISSED.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment be GRANTED on the plaintiff's claims that: Daigrepont threatened to harm the plaintiff if he did not act as an informant; plaintiff was denied access to courts; plaintiff was denied due process when he was placed in administrative lockdown; plaintiff's due process rights were violated when the defendants failed to investigate Daigrepont's alleged wrongdoing; the disciplinary board imposed an excessive sentence; and that the defendants conspired to have the plaintiff locked up on false disciplinary charges.

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IT IS FURTHER ORDERED that the defendants' motion for summary judgment be GRANTED on the plaintiff's claim that his due process rights were violated when the disciplinary board members, Michael Roberts and Harvey Grimmer, failed to dismiss the disciplinary reports on the ground that the plaintiff was illegally placed in administrative lockdown.

IT IS FURTHER ORDERED that in all other respects the defendants' motion for summary judgment be DENIED.

IT IS FURTHER ORDERED that the matter be referred back to Magistrate Judge for further proceedings.

Baton Rouge, Louisiana, ~~December~~ Jan. 2, 1994 ~~1993~~.

FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE